1 IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA
2

BETTY ANN MARSEE, )
3 Administratrix of the Estate )
of MARVIN SEAN MARSEE, )
4 Deceased, )
)
5 Plaintiff, )
)
6 vs. ) No. Civ-84-2777R
)
7 UNITED STATES TOBACCO CO., )
a New Jersey corporation, )
8 )
Defendant. )
9

10 TRANSCRIPT OF JURY TRIAL PROCEEDINGS
Friday, June 6, 1986
11

A p p e a r a n c e s:
12

HON. DAVID L. RUSSELL,
13 U.S. District Judge, Presiding

14 GEORGE W. BRALY, Esquire
DANIA DESCHAMPS-BRALY, Esquire
15 Braly & Braly
217 North Mississippi
16 Ada, Oklahoma 74820
Appeared for Plaintiff.
17

TIMOTHY M. FINNEGAN, Esquire
18 Jacob, Medinger & Finnegan
1270 Avenue of the Americas
19 Rockefeller Center
New York, N.Y. 10020
20 and
ALSTON JENNINGS, Esquire
21 Wright, Lindsay & Jennings
2200 Worthen Bank Building
22 Little Rock, Arkansas 72201
Volume 23 and
23 ANDY COATS, Esquire
Crowe & Dunlevy
24 1800 Mid-America Tower
Oklahoma City, OK 73102
25 Appeared for Defendant.



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1
2 Maynard E. Peterson, CSR
Acting Official Reporter
3
4
5 BE IT REMEMBERED, that on the 6th day of
6 June, 1986, the above matter coming on for jury trial
7 before the Honorable David L. Russell, United States
8 District Judge for the Western District of Oklahoma,
9 and the parties appearing in person and or by counsel
10 as hereinabove set forth, the following proceedings
11 were had:
12
13 MORNING SESSION
14 Friday, June 6, 1986
15 THE COURT: Be seated. Call your next
16 witness for the plaintiff.
17 MR. BRALY: Your Honor, we have one more
18 commercial of Carlton Fisk that will last about 30
19 seconds, and we will call James Cagley.
20 THE COURT: What is the exhibit number?
21 MR. BRALY: 16-D.
22 (Plaintiff's Exhibit 16-D was here exhibited to
23 the jury.)
24 MS. DESCHAMPS-BRALY: Your Honor, the
25 plaintiff will call Doctor James Cagley.



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1 JAMES W. CAGLEY, PH.D.,
2 called as a witness on behalf of the plaintiff, being
3 first duly sworn, testified as follows:
4 DIRECT EXAMINATION
5 BY MS. DESCHAMPS-BRALY:
6 Q. Doctor Cagley, would you state your full
7 name, please.
8 A. James William Cagley.
9 Q. And where do you live, sir?
10 A. In Tulsa, Oklahoma.
11 Q. Where do you work?
12 A. University of Tulsa.
13 Q. What kind of work do you do for the
14 University of Tulsa?
15 A. I'm a teacher, university professor.
16 Q. And, Doctor Cagley, you have been called as
17 a witness on behalf of Sean Marsee as a person who
18 has specialized knowledge, skill, training,
19 experience or education who for that reason may be
20 able to help the jury determine the facts in this
21 case. Do you possess such specialized skill,
22 knowledge, training or education?
23 A. Yes.
24 Q. Would you describe for the jury your area of
25 special expertise, please.



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A. At the University of Tulsa I'm a professor of marketing. My particular area of expertise is marketing, marketing management --

THE COURT: Sir, I hate to interrupt you.

THE WITNESS: I'm sorry.

THE COURT: Would you pull the microphone around in front of you, so we can hear better.

A. Marketing and particularly primarily and I am responsible for the areas of promotion, advertising, sales.

Q. (BY MS. DESCHAMPS-BRALY) Would you tell the Court and the jury of your formal education that you have in order to achieve this expertise.

A. All right. My formal education was all obtained at the University of Minnesota. I obtained a bachelor of science degree in business administration in 1965. My major area was marketing. My minor areas were economics and sociology. I obtained a master of science in 1968, major marketing. My minor areas were psychology and sociology. 1971 I attained a Ph.D., Doctor of Philosophy, again from the University of Minnesota. The major was business administration with a major within business of marketing. My related field in business was insurance. My minor areas outside the



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1 school of business again were psychology and
2 sociology.
3 Q. Doctor, aside from the formal training that
4 you had, would you tell the jury about your practical
5 knowledge and experience in the field of marketing
6 and advertising.
7 A. Certainly. A couple sources I think that
8 are extremely relevant and in which I have developed
9 more practical knowledge. For a period of time,
10 eight years to be precise, I was a golf professional.
11 I instructed in golf. I managed a golf shop so I
12 learned retailing reasonably well. In 1973 I went to
13 work for the Joseph Schlitz Brewing Company in
14 Milwaukee, in the corporate offices in the consumer
15 research department. My duties amongst other things
16 were advertising, creative research, were demographic
17 research, lifestyle research, ethnic research,
18 product brand positioning research, basically any
19 kind of consumer research that we felt was relevant.
20 Worked on four brands at Joseph Schlitz
21 Brewing Company, the Schlitz brand, Old
22 Milwaukee brand, the brand Primo and probably few
23 have heard of Primo, and Schlitz Malt Liquor, where
24 my principal work was done.
25 I left Joseph Schlitz Brewing Company in



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1 1978 and have been at the University of Tulsa since
2 then. Other kinds of experience that I have had
3 relate to the consulting activities since I have been
4 at the University of Tulsa. And just to read you the
5 list of some of the people I have consulted for,
6 Flintco, United Airlines, the Oklahoma Real Estate
7 Commission, First National Bank of Tulsa, Tulsa State
8 Fair Authority, Crosby Group, two C-E companies,
9 Combustion Engineering, C-E Invalco and C-E Natco,
10 Seismograph Service Corporation, things of that
11 nature. That's my principal area where I obtained my
12 practical knowledge and experience.
13 Q. Now, sir, would you tell the Court and the
14 jury what types of materials I furnished you with in
15 order to prepare your testimony.
16 A. I received several kinds of materials from
17 you. Most of the materials were internal United
18 States Tobacco documents, memos, research reports,
19 some planning documents, some research reports. I
20 also received several videotapes of commercials,
21 television commercials, some radio tapes, copies of
22 magazine ads, a promotional film or two, one "The Art
23 of Pleasure," which seems to be a sales presentation
24 film, then a driver's education film.
25 Q. Now, would you tell the jury what types of



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1 materials you sought out on your own in order to
2 prepare yourself for your testimony today.
3 A. The kind of documents that I prepared
4 were -- Being an academic, my first response was to
5 go to some of the academic journals in the topics
6 that I felt were relevant, so I did that. I also
7 looked at many periodicals, again relative to Ad Age,
8 Business Week, those kind of things, and also several
9 textbooks that related specifically to consumer
10 behavior kinds of things.
11 Q. Doctor Cagley, as a result of your
12 investigation, the materials you reviewed and the
13 company documents and videotapes which we supplied
14 from U.S. Tobacco to you, do you have an opinion
15 within a reasonable degree of professional certainty
16 as to whether smokeless tobacco advertising as it has
17 been employed by United States Tobacco Company since
18 the late 1960's is effective in promoting the use of
19 their smokeless tobacco, Skoal and Copenhagen,
20 promoting that use by children?
21 A. Yes, I do have an opinion.
22 Q. And what is that opinion, sir?
23 A. I think it is positive. I think the
24 advertising they have done would have had an effect
25 on children.



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1 Q. Now, I want you to tell the jury why you
2 believe that, and in that regard will you first tell
3 the Court and the jury generally how advertising and
4 particularly television advertising affects children.
5 A. Okay. Two types of research that I looked
6 at, one, most of the research that has been done on
7 young people has been done between the ages of five
8 and twelve years of age, basically elementary-grade
9 people. The research, the academic research has
10 looked at a couple of things. It's looked at across
11 that age span of children as consumers, the kinds of
12 things they buy and the kinds of products they buy.
13 There is another group of research which
14 deals with children's influence on parents, what do
15 they ask for, do their parents buy things they ask
16 for.
17 There has been another group of research
18 articles that deal with strictly the effects of
19 advertising on children, and the fourth major
20 category of types of research has to do with, for
21 want of a better phrase, socialization, and the
22 process by which children go through to learn to be
23 consumers. That's the kind of research that I looked
24 at.
25 The other body of research deals with older


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1 children, adolescents, middle school, high school,
2 and there hasn't been a great deal of research in
3 that area, academic research, anyhow.
4 Q. Doctor Cagley, you mentioned socialization
5 agent, which is a big word, in the process of
6 training children in consumer roles. What are you
7 talking about and what are those socialization
8 agents?
9 A. There is a couple kinds of information that
10 children pick up. One is directly relevant consumer
11 behavior knowledge. And they tend to learn most of
12 that -- I'm talking about things like the idea of
13 prices, the idea of budgeting, the ideas of value.
14 They tend to learn most of that kind of information
15 from their parents and from their family. So at
16 least in the early stage the family is extremely
17 important as a consumer socialization influence.
18 There is another group of skills,
19 second-order consumer skills, if you want to talk
20 about those, that are, for example, what clothes go
21 well in what situation, what stores should I go to,
22 what do people expect of me. That kind of
23 information is learned typically from different
24 sources.
25 The family is extremely important as a



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1 socialization influence or agent on the more
2 rational kind of consumer behavior issues. Other
3 people are more important on the social expressive
4 kinds of issues. So the family is probably the first
5 socialization agent that the child is -- grows up in
6 and learns from.
7 Religion is a socializing agent, not
8 particularly relevant to consumer behavior, but
9 perhaps things on fairness and those kinds of
10 things. Work is a socialization agent, again not
11 particularly relevant to 5- to 12-year-old kids.
12 Educational institutions are also a socializing
13 agent, in essence, teaching children how to get along
14 with one another, learning the socialize aspects of
15 life, and also related to some consumer behavior
16 issues.
17 Q. Doctor Cagley, what is the role of
18 television as a socialization agent? Could you hear
19 me?
20 A. Yes, I can hear you fine.
21 The media, mass media, television,
22 magazines, newspapers, those kinds of media are very
23 influencing to children. Television is the most
24 important medium, because most young children don't
25 read too well, and so they don't avail themselves of



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1 magazines and newspapers, but they tend to watch
2 television a great deal.
3 Television does a couple of things to
4 children, for children. It provides a look at things
5 outside the home. It provides a window to the world,
6 perhaps beyond your home, beyond your own experience.
7 The child, and we are, too, even at our significant
8 age, are exposed to what society thinks is important,
9 the values that society has, the people that are
10 important, the people that are applauded by society,
11 those kinds of things, media, television in
12 particular, are extremely important.
13 Q. Doctor, as a parent I read a lot about group
14 peer pressure. Is this an aspect of the
15 socialization process?
16 A. Yes, it is, and it tends to become much more
17 important when the person is outside the influence of
18 the family when he or she starts going to school.
19 Groups, peer groups, reference groups, whatever the
20 term you want to use, are very important. They're
21 important from a couple of points of view. For a
22 person, young or old, the groups that he or she
23 belongs to or want to belong to very much shape their
24 attitude, very much shape their perceptions on
25 things. Group norms reward conformity, so you want



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1 to be part of a group, you will conform to the
2 group. It also punishes deviations from those group
3 standards, kind of shorthand, to fully become a group
4 member. You comply with their behavior, you identify
5 with that group, and you tend to internalize the
6 group's values. When you do those kinds of things,
7 you are part of a group.
8 Q. Excuse me. Did I interrupt?
9 A. No, those kind of influences become more
10 important as the child grows away from the family.
11 Q. So all of these different socialization
12 processes that you have mentioned, you consider them
13 all to be important?
14 A. Yes.
15 Q. Now, how do marketers generally use
16 observations from experts such as yourself?
17 A. The ways that I am most familiar with in how
18 marketers use findings from consumer research are
19 most typically seen in the trade for advertising,
20 whether it be television, print, newspaper, whatever.
21 They also use those kinds of findings in terms of who
22 is more important to people in terms of media
23 placement. Those are the two easiest things to talk
24 about and the two most applicable areas.
25 Q. And what are some of the techniques that



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1 advertisers use to achieve these particular
2 objectives?
3 (The last question was read by the reporter.)
4 A. One of the techniques that advertisers use
5 to make use of effective groups and reference groups
6 and peer groups is the kind of people that they show
7 in their advertising, either using or advocating the
8 use of a product. We call -- the spokespeople, the
9 kinds of people in ads.
10 For example, let me give you an example. I
11 mentioned the word "identification," whereby a person
12 would tend to identify with a particular group, in
13 essence, want to be part of that group, and would
14 identify with the people within that group and the
15 group's values. One of the easiest ways that
16 marketers and advertisers use that kind of influence
17 is having a product endorsed by a person who is a
18 significant and relevant reference point for that
19 person.
20 I am giving you an example. If I were to go
21 buy a pair of tennis shoes this afternoon and I would
22 go to a shoe store and I would say, "I want a pair of
23 tennis shoes," and the salesperson probably would
24 show me several kinds. A tennis shoe is a tennis
25 shoe, but a tennis shoe that is endorsed by Magic



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1 Johnson takes on additional values. A tennis shoe
2 that is endorsed by Michael Jordan, -- in fact, he
3 has his brand, -- the endorsement is Jordan's tennis
4 shoe endorsement or Larry Bird from the Boston
5 Celtics, all of a sudden those products take on a
6 little bit different meaning. They take on a
7 symbolic meaning beyond just the fact that they are a
8 pair of tennis shoes made up of rubber and canvas.
9 In essence, what happens is that the person
10 advocating the use of a particular product, people
11 seeing those ads or hearing those ads, in whatever
12 context they are in, say, "If I could use those
13 tennis shoes, I could probably play ball like Magic
14 Johnson or Larry Bird," or at least I am willing to
15 vicariously say "I think I can." That's the easiest
16 use of identification, I guess, the use of
17 spokespeople.
18 Q. Now, Doctor, you may have answered this a
19 little bit just then, but what generally makes a good
20 spokesperson for products?
21 A. First of all, the spokesperson that you are
22 using has to be visible, has to be known. Also, it
23 is extremely important that that spokesperson you use
24 be seen as providing a good match between that person
25 and the product. Let me give you a couple of



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1 examples.

2 A few years ago I saw an ad for Aladdin

3 thermos jugs, and it was designed -- the positioning

4 was it was a jug to use when you are at work. At

5 noon you can keep soup or chili or whatever hot. The

6 spokesperson in that particular commercial was Buddy

7 Hackett, who is a comic, a Las Vegas comic. He did

8 not fit. What Buddy Hackett is is a Las Vegas

9 entertainer. I don't imagine Buddy Hackett wears a

10 hard hat very often at a construction site.

11 A good use would be an Eastman Kodak.

12 Eastman Kodak is trying to position themselves and

13 has positioned themselves as being a product film

14 cameras for family and they are talking about

15 memories. If you wanted to get a family man to be

16 a spokesperson for you, the one they are using is

17 Michael Landon. Michael Landon many years ago, you

18 remember, "Little Joe" on Bonanza, he was the little

19 kid that kind of dragged along. Then he was -- the

20 father on Little House on the Prairie. He was the

21 ultimate father figure and now he's an and I think he

22 will on "Highway to Heaven". The family, the match

23 worked very well for Michael Landon and Kodak's use

24 of Michael Landon.

25 A couple other things. The spokesperson you



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1 use should be attractive. What do I mean by
2 attractive? He should be familiar to you. You
3 should like that spokesperson, and you should be able
4 to say, you know, I would like to be like that, that
5 person's values are similar to mine. I will give you
6 an example. Ed McMahon is a spokesperson for
7 Budweiser beer. Ed McMahon everybody knows Ed
8 McMahon in his role as Johnny Carson's sidekick. You
9 look at McMahon. Ed McMahon looks like a beer
10 drinker. You look at Ed McMahon and you find it very
11 difficult to find anything bad to say about the guy.
12 I mean he's Ed McMahon. He's an extremely attractive
13 person and -- not attractive in terms of physical
14 attractiveness -- but what he is and what he
15 represents.
16 Another area that is extremely important to
17 this spokesperson is credibility. That person has
18 got to be believed when he or she is telling
19 something. And that comes from a couple -- a couple
20 ways. One is you got to be able to trust that
21 person, that person has got to come off as being
22 honest, as being sincere, as being believeable.
23 That person has also got to come across as
24 being knowledgeable, expertise, if you want, through
25 either some sort of specialized training or



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1 experience. Example, E.F. Hutton a few years ago was
2 running some ads with J. Paul Getty. J. Paul Getty
3 at that point in time was the richest man in the
4 world. If he's interested in E.F. Hutton, he's a
5 credible person, because he's very knowledgeable
6 about investment activities.
7 A reputation, reliability, either personally
8 or as a member of a profession is also a way to
9 contribute to expertise. Examples. Again. Doctors
10 and advertising, dentists in advertising, Sanka
11 coffee for a number of years, they have stopped using
12 them, but they did for a while, Robert Young. Robert
13 Young was a Marcus Welby in television, and he was a
14 father in Father Knows Best -- no -- Father Knows
15 Best, Robert Young, wow. Extremely personally
16 reliable person.
17 Firestone tires a few years ago, Firestone
18 500 had some problems with their tires, they tended
19 to not last very long. They used for a short period
20 of time James Stewart as a spokesperson. That was
21 the first advertising he had ever done. Extremely
22 good reputation in James Stewart.
23 Those are kind of expert things. You don't
24 have to be an expert. The audience can look at you
25 and assume you are an expert, also. And again,



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1 example. Quaker Oats in their advertisements for
2 cereal they produce called "Life," has used a young
3 man named "Mikey" since 1971. If "Mikey" will eat
4 it, anybody will eat it. All of a sudden "Mikey" is
5 an expert on the consumption of cereal, and we all
6 assume that he is. He has credibility. By the way
7 "Mikey" just graduated from high school this year,
8 he's off to college. I don't know what they are
9 going to do. That commercial has been running for 15
10 years.
11 Another aspect of the credibility is the
12 status of the prestige, and in general if the person
13 or the spokesman has some status, has some prestige,
14 he will tend to be -- be received as a more
15 credible -- credible source, if you will, credible
16 spokesperson.
17 Q. Doctor Cagley, building on what you have
18 been talking about, what is the goal or objective of
19 a consumer products marketing strategy?
20 A. Several different objectives. May I use
21 the --
22 MS. DESCHAMPS-BRALY: Your Honor, may the
23 witness approach the board?
24 THE COURT: Okay.
25 A. I try to approach this --



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1 Q. Do you need a marker, Doctor?
2 A. Yes. (Handed to the witness).
3 I tried to look at it from the point of a
4 company, that is, a dominant company within the
5 industry, because that's what I think we are talking
6 about here, U.S. Tobacco has 89 to 90 percent of the
7 share of the market. Their approaches to the market
8 will be different than for example a company that has
9 1 to 2 percent of the market, because the tasks are
10 different. For a company that is dominant, -- as I
11 tell my students, if you can't read this, please stop
12 me.
13 Q. Doctor Cagley, two things, --
14 A. Yes?
15 Q. Number one, can you speak up a little
16 louder? They may be able to hear you over there, but
17 I am having a little bit of a problem, and, No. 2, I
18 know you prepared some notes from all the numerous
19 documents you have looked at, you are welcome to use
20 those over at the board, if you need to.
21 A. Okay. Thank you. As a dominant firm role,
22 a very large firm in my particular area of interest,
23 in my particular industry, a couple things. Probably
24 the most important objective I have is trying to
25 expand the total market. In other words, usage of my



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1 product. For example, I am the dominant firm in the
2 industry. If I can expand total -- the total market
3 or usage of my product, I will get the lion's share
4 of that. And I can do that a couple of ways.
5 Q. I can tell you must be used to chalk. You
6 tried to erase.
7 A. Yes. One is to attract new users into the
8 marketplace. New product users, or new users to my
9 brand. A couple ways. For example, convert nonusers
10 to my product. An example of an industry that has
11 done that or at least tried to do that is the men's
12 fragrance industry. Up until a few years ago, men
13 did not use cologne very much. They made a very
14 strong effort to get men to use colognes. Now, they
15 are trying to convert nonusers to the product, start
16 using it.
17 Another way of accomplishing to expand the
18 total market it to look at new market segments and
19 try to get new market segments to use my product.
20 Another way that I, in particular, can
21 benefit is try to get my competitors' customers to
22 use my product or use my brands. New users are very
23 important.
24 Another way of accomplishing the same thing
25 is new uses for my product. Hopefully, I will



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1 attract, again, new users to my product. I will give
2 you an example the cereal industry for a while found
3 that people used just dry ready-to-eat cereal only in
4 the morning. If they could promote new uses for that
5 product, they would bring people in and increase
6 usage. What they have done is tried to offer their
7 cereal as a snack. They have produced them as
8 snacks, Kellogg's, in particular with some of their
9 Rice Krispie products.
10 Another way is to try to generate more usage
11 of the product and hopefully my brand, more frequent
12 use, more use per occasion or new and varied uses.
13 My principal goal. Whoops. Out of paper.
14 THE COURT: Is there no more paper
15 underneath there?
16 THE WITNESS: No.
17 THE COURT: We have another one of those.
18 THE WITNESS: This is all used.
19 THE COURT: We will get you another one.
20 Q. (BY MS. DESCHAMPS-BRALY) I'll tell you
21 what, Doctor Cagley, why don't you go on that and
22 write on the cardboard that is behind it until we get
23 the new one in. That will save some time.
24 A. All right. The second major objective that
25 I have, major strategy, is to protect what I have.



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1 How do I do that? I am not worried about expansion
2 as much as I am worried about protecting what I have,
3 working on that. Hopefully I will attract new users
4 to my product or my brand, and maybe I will increase
5 usage of it, also. A couple ways. New products,
6 different things to try to go within my product
7 group. Various sorts of improvements, for example,
8 maybe in the quality of my product, perhaps in the
9 features of my product to try to provoke additional
10 convenience, for example.
11 A third major step that I have is to try to
12 expand the market share, given the realization that
13 there are some limits to doing that before the United
14 States Government gets interested in antitrust kinds
15 of activities. So the two principal ways that I can
16 use to improve my position, first trying to expand
17 the total market by getting new users and more
18 usage. The second way to try to protect what I have,
19 be innovative in terms of new products, improvements
20 perhaps in regards to the quality and feature
21 elements of my product.
22 Q. Now, Doctor Cagley, is maintaining growth a
23 part of what you are talking about, or is this a
24 different area?
25 A. No, maintaining growth is very much a part


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1 of that.

2 Q. And so all the things that you described

3 then go into how you maintain growth in a company,

4 also?

5 A. Yes.

6 Q. Did the U.S. Tobacco Company do the things

7 that you are talking about?

8 A. If I go down that list, I see applications

9 for every one of those in the documents that I have

10 seen.

11 Q. According to the documents that you have

12 seen, who are the users of snuff?

13 A. I approached that principle, I guess, from

14 the documents I have seen, yes, internal documents

15 U.S. Tobacco Company entitled National Survey of

16 Moist Snuff Users 1980-1982 and 1984.

17 MR. COATS: If Your Honor please, may we

18 approach the bench?

19 (The following proceedings were had AT THE SIDE

20 BAR.)

21 MR. COATS: Okay. I believe that's one of

22 the documents that has already been ruled out of

23 evidence in other depositions. I think we have got

24 that problem two or three times here, the areas where

25 you sustained objections to documents that he may be



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1 referring to, and we don't think you ought to be able
2 to refer to them if they have been ruled out.
3 MS. DESCHAMPS-BRALY: Your Honor, I am not
4 sure about whether this particular document has been
5 or not, but this is not a document that is being
6 introduced into evidence. This is a document upon
7 which he is relying on as a basis of his opinion.
8 THE COURT: I don't see much distinction. I
9 don't remember what it was.
10 MR. COATS: These were documents that were
11 attached to Doctor Per Erik Lindqvist's deposition
12 that were ruled out as having no applicability to
13 this case, and for those reasons and that's the point
14 we have been through all through here. He's relied
15 on a number of documents which can't be used. I
16 think he can't refer to the documents. I suppose he
17 can give his conclusions if he has other valid
18 documents to base them on.
19 THE COURT: What point are you trying to
20 make?
21 MS. DESCHAMPS-BRALY: Well, Your Honor, the
22 point that I am trying to make is that they have an
23 overall marketing analysis and a strategy that they
24 base on that when they go out there and do their
25 studies. They don't do just a specific study on this



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1 one little area, this one area. First of all, they
2 find out who is using it and why they are using it in
3 order to determine what kind of products they are
4 going to need to appeal to what segments of the
5 population.
6 THE COURT: That is interesting, but what
7 ultimate point are you trying to make?
8 MR. BRALY: Your Honor, they are marketing
9 to young people, Judge. It's not something that this
10 guy can testify to in a vacuum, and you know, if he
11 hadn't reviewed the company documents, they would be
12 up here testifying about how he hadn't reviewed the
13 company documents.
14 THE COURT: Is he saying these documents
15 reveal, the one we are talking about now, reveal that
16 they are selling to minors?
17 MS. DESCHAMPS-BRALY: As a stepping stone,
18 as he reviews these documents and what they have done
19 through the years, he's going to come to the
20 conclusion that, yes, they were appealing to the age
21 bracket under 18 years of age, but he can't do that
22 from one specific document. He's got, you know, it
23 is like the lawyers get up there and argue about the
24 jigsaw puzzle all this time, this document, this
25 document, and puts them all together and he draws


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1 this picture of what, in fact, they have done.
2 THE COURT: I'll tell you what I am going to
3 do. I am going to continue to sustain the objection
4 as far as the document, but I will let him testify as
5 to his review of the documents.
6 MR. COATS: Let me just be sure I understand
7 the guidelines. I think he could -- for sure he's
8 seen the television commercials. He can talk about
9 the appeal of those, if any. My understanding is
10 though, this Court's ruling, he can't refer
11 specifically to the documents that are out; is that
12 right.
13 THE COURT: I am not going to allow the
14 documents themselves into evidence. I will allow him
15 to testify he's reviewed, now, if his testimony
16 becomes itself objectionable, if there is something
17 he testifies to you think is objectionable, I might
18 sustain it, obviously object, but just the fact that
19 he's reviewed in documents that I have not allowed
20 into evidence, I don't think that would go to make
21 his testimony itself objectionable.
22 MR. COATS: But we wouldn't allow him to
23 quote from documents, I suppose, if he's not drawing
24 a conclusion on it, if he quotes from something that
25 isn't in evidence, he's reviewed documents and his



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1 conclusions are such and such, but I think he can't
2 quote from documents that have been ruled out of
3 evidence.
4 THE COURT: Let's wait and see what he has
5 to say.
6 Go ahead.
7 (The following proceedings were had IN OPEN
8 COURT.)
9 MS. DESCHAMPS-BRALY: Mr. Peterson, would
10 you reread that question back, please.
11 THE WITNESS: Please.
12 (The last question was read by the reporter.)
13 A. Okay. Again, the document which I am
14 talking about here, I base most of my information on
15 an internal U.S.T. document from their corporate
16 research department, dated June, '84.
17 THE COURT: Doctor, don't quote specifically
18 from the document.
19 THE WITNESS: Okay.
20 THE COURT: If you can state a conclusion as
21 to your review of those documents, I will allow that
22 in, but otherwise don't quote the document itself.
23 THE WITNESS: Okay.
24 A. Who uses moist tobacco. The incidence of
25 using it amongst the general population, among people



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1 18 years and above is about 5 percent. If you look
2 at that incidence of use, it is 5.1 percent, to be
3 exact, in 1984. The incidence of use is higher
4 amongst people, again, people who live in C and D
5 counties is a census designation, smaller counties,
6 rural areas, amongst those people who their
7 individual income is less than or equal to $15,000 a
8 year.
9 It is also higher than average amongst those
10 people in an income of above 25,000 a year,
11 education, high school or less; occupation, blue
12 collar, and in particular, -- blue collar. So it is
13 also highest when you look at age categories, the
14 incidence of use again now amongst 18- to 24-year-old
15 people.
16 Q. Doctor Cagley, do you have information as to
17 patterns of usage in when people start using the
18 snuff?
19 A. Yes. The document was the Surgeon General's
20 report. They looked at several states and did some
21 surveys within the context of that report. Their
22 conclusion is -- and can I read a quote?
23 MR. COATS: If Your Honor please, may we
24 approach the bench again?
25 (The following proceedings were had AT THE SIDE



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1 BAR.)

2 MR. COATS: We object to the reference to,

3 again, the 1980 report.

4 THE COURT: Is the Surgeon General's report

5 not in evidence?

6 MR. BRALY: Yes, it is in evidence.

7 MS. DESCHAMPS-BRALY: Yes, it is in

8 evidence.

9 MR. COATS: The 1986, I guess the one he's

10 looking at, after the time of Sean Marsee's death,

11 which we suggest it is improper testimony for him at

12 this point.

13 MS. DESCHAMPS-BRALY: First of all, it was

14 already admitted into evidence, and second of all,

15 he's reading from that report for the basis of his

16 opinion.

17 THE COURT: I agree.

18 MR. COATS: That time is well after Sean

19 Marsee's use of these products.

20 THE COURT: Overruled.

21 (The following proceedings were had IN OPEN

22 COURT.)

23 Q. (BY MS. DESCHAMPS-BRALY) Doctor Cagley,

24 let's try this again. Will you go back to what you

25 were saying about the Surgeon General's report?



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1 A. I will read the quote. "The recent national
2 survey indicates that 16 percent of males between 16
3 and 25 years of age have used some form of smokeless
4 tobacco within the past year, and that from one-third
5 to one-half of them used smokeless tobacco as recent
6 as once a week."
7 They also within the context of that report
8 looked at several states and the incidence of usage
9 by different grade categories in high school, middle
10 school. For example, the incidence of use in
11 Arkansas between grade levels of 10 and 12 is 26
12 percent incidence of a daily use of smokeless
13 tobacco. Oregon, 7th Grade, 9 percent, Oregon, 10th
14 grade, 23 percent. Pennsylvania, between the ages --
15 I'm sorry, grades of 7 and 12, the incidence of daily
16 use is 30 percent. And Wisconsin, they looked at 7
17 through 12, and the incidences go from, again, daily
18 use, 3 percent in Grade 7 to 15 percent in Grade 12.
19 There has also been some apparent changes
20 over a period of time. There was one study or one
21 state that looked at the incidence of use among males
22 of snuff between the ages -- between the years
23 1966 -- 1976-77 and 1981-82.
24 Q. Would that have been Doctor Hunter's study
25 that you are referring to?



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1 A. I am not sure of the name.
2 Q. Bogalusa?
3 A. Yes. That name I can remember. Let me
4 write something on the board, and I have a chalk
5 board now.
6 THE COURT: Counsel, come up just a moment.
7 (The following proceedings were had AT THE SIDE
8 BAR.)
9 THE COURT: I don't want him to go into
10 showing more people now using the product than were
11 using back in '82 and '81 and prior to his death.
12 I don't think that is relevant. I have ruled that
13 things happened after his death, particularly, that
14 is not--
15 MR. BRALY: What you want, I think it
16 was comparing the '76 numbers with the '81 numbers.
17 THE COURT: Well, I will allow that, but I
18 don't want any '86 figures.
19 MS. DESCHAMPS-BRALY: Okay.
20 MR. COATS: All right. Your Honor, please,
21 one other point as noted indicates the Surgeon
22 General's report is not in the record.
23 MR. FINNEGAN: Our reports don't show that.
24 We need a clarification.
25 THE COURT: Well, in any event, I think you


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1 can rely on that to form an opinion. Let's -- I want
2 to steer away from anything after 1984.
3 MR. FINNEGAN: Thank you, Your Honor.
4 (The following proceedings were had IN OPEN
5 COURT.)
6 Q. (BY MS. DESCHAMPS-BRALY) Doctor Cagley, you
7 may continue to do what you have been doing, but if
8 you would be so kind when you are referring to
9 figures and so forth, please stay within the
10 boundaries and don't go past 1984.
11 A. Okay. Pre-'84?
12 Q. February, 1984.
13 A. Okay, --
14 Q. Stay --
15 A. -- before that.
16 Q. -- in those boundaries. Any time before
17 that up until that is fine.
18 A. Okay.
19 Q. You may return to the board if you feel like
20 it.
21 A. Okay, thank you.
22 The numbers I am going to write down here
23 are age categories, 8-9, 10 to 11, 12 to 13, 14 to 15
24 and 16 to 17. And, again, the numbers I am going to
25 write here are percent incidence of use amongst the



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1 males. 4 percent, 7 percent.

2 MR. COATS: Excuse me, Your Honor. Is this

3 the number from the Bogalusa study that we heard

4 yesterday? If that is the same thing, we object to

5 it as being repetitious. We went through that all

6 day yesterday, and I think that is what he is quoting

7 from.

8 THE WITNESS: Yes, the Surgeon General

9 report.

10 THE COURT: Overruled.

11 Q. (BY MS. DESCHAMPS-BRALY) You may go ahead,

12 Doctor.

13 A. The five-year period, what has happened in

14 the incidence of usage amongst men in these age

15 categories. They have increased is the point I

16 wanted to make. So there has been -- at least it is

17 reported in this study, an increase in incidence of

18 use in and amongst some Louisiana school people.

19 Q. Doctor Cagley, everything that you have been

20 talking to us about, from what the documents that you

21 looked at, in your opinion did the top officers of

22 the U.S. Tobacco Company know about all these

23 matters?

24 A. Yes.

25 Q. Now, let me steer you in a little bit



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1 different direction for a while. Okay? Why do
2 people use snuff?
3 A. As indicated in the documents that I have
4 seen, when you are looking at adults, and this is 18
5 and above, the quote product attributes that were
6 agreed most with, cut down on smoking, hands free, a
7 convenience kind of benefit, satisfaction and taste
8 and flavor.
9 Other reasons for using moist smokeless
10 tobacco, predominantly inner satisfaction for using
11 moist are relaxation, refreshment, feeling of
12 independence and security, peer acceptance. There is
13 also a sense of pride among young dippers. Common
14 reasons for starting include peer pressure, the need
15 to be one of the gang.
16 Concerns about health. The Surgeon
17 General's report looked at younger people,
18 adolescents and why they use smokeless tobacco. The
19 principal reasons given for initiating the use of
20 moist smokeless tobacco were given as pressures --
21 pressures from friends, peer pressure. For continued
22 use the reasons given were enjoyment of taste and
23 habit strength.
24 Q. Doctor, what was U.S. Tobacco Company's
25 strategy and approach to the marketing objective that


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1 you have been talking about?

2 A. Okay. Again, from the documents that I have

3 seen, and may I use quotes?

4 Q. Yes, you may. If there is an objection,

5 then please stop until the judge has ruled on the

6 objection.

7 A. Okay. I have got a feel -- "I obtain a

8 feeling --

9 MR. COATS: If the Court please, may we

10 approach the bench.

11 THE COURT: Well, let him respond.

12 MR. COATS: Well, all right.

13 THE COURT: You know what he's going to

14 answer in advance.

15 MR. COATS: He started reading from

16 documents. I don't know --

17 THE COURT: What document is it?

18 MR. COATS: That is the question. We don't

19 know what the documents are.

20 MR. BRALY: This is a document that is

21 labeled "U.S. Training News Conference Scenarios."

22 There is no date on it. The part that I am looking

23 at when I got it didn't appear to belong to this

24 document.

25 THE COURT: That's enough. Are you familiar



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with it?

MR. COATS: No, sir, I am not. I don't know what it is.

THE COURT: Why don't you go over and look at it.

MR. COATS: All right. Thank you.

This one?

THE WITNESS: Yes. The title of is "Three Phases of International Policy."

MR. COATS: Are these the tabs.

THE WITNESS: This is the tab. It didn't belong to that, I don't believe. This is a different -- then this is not what I am talking about right now.

MR. COATS: This is not? What is it you are talking about?

THE WITNESS: This one, unfortunately backwards, "Three Phases of International Product Strategy."

MR. COATS: Excuse me, please.

(The following proceedings were had AT THE SIDE BAR.)

MR. COATS: If the Court please, we object to the use of the documents, first of all, Phase 3, Skoal Long Cut came out in 1985, '84, sometime. This



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1 would deal with products that would not be marketed,
2 Skoal Bandits were not even being marketed at any
3 time relevant to this case.
4 MS. DESCHAMPS-BRALY: Your Honor, it is
5 impossible for this man to testify about an overall
6 strategy as to Copenhagen because that is not the way
7 that this company functions. They have an overall
8 marketing strategy for their smokeless tobacco
9 products.
10 THE COURT: I understand that, and I am
11 perfectly compatible with you on that, other than it
12 has got to be prior to 1984.
13 MS. DESCHAMPS-BRALY: Right.
14 MR. COATS: These aren't.
15 THE COURT: These aren't apparently.
16 MS. DESCHAMPS-BRALY: Where is the date on
17 it?
18 MR. COATS: Skoal Long Cut wasn't marketed
19 in'84 or'85.
20 MR. FINNEGAN: I think that's right.
21 THE COURT: Let's ascertain that if there
22 is a question about it.
23 MR. BRALY: Judge, the fact is they had the
24 same marketing strategy for Skoal Long Cut as they
25 did in the previous documents.



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1 THE COURT: You can forget the Skoal Long
2 Cut then.
3 MR. COATS: Late 1984.
4 THE COURT: If it is the same strategy, all
5 you have to do is eliminate--
6 MR. COATS: But it wasn't.
7 THE COURT: They are saying it is the same
8 strategy. If it is not the same strategy,--
9 MR. COATS: The only documents they refer to
10 are documents that are referred to during --
11 MR. DESCHAMPS-BRALY: If, for example, you
12 were doing a study about a project, okay, the study
13 that you have done may come to fruition now, but it
14 has taken place in times past. That is the same
15 thing as an admission. I may admit today in 1985
16 that I committed adultery in 1984. The fact that I
17 admitted it now doesn't mean that it didn't happen
18 back then.
19 THE COURT: You mean is there something
20 indicating this was here?
21 MS. DESCHAMPS-BRALY: No, I will give two
22 different examples. What I am saying, although this
23 may have come to fruition at a certain year when the
24 product was produced, the research and marketing
25 strategy and so forth that went into the production



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1 and what the marketing part of it was going to be
2 like was done long before the product was ever put on
3 the market. Do you understand what I am trying to
4 say?
5 THE COURT: But the whole part, though, in
6 my sustaining the objection is I am limiting the case
7 to the impact on Sean Marsee and what they did in the
8 advertising strategy that was implemented after his
9 death is just not relevant to the case.
10 MR. BRALY: He is using the document in
11 order to understand the company's policies. Those
12 are ongoing policies.
13 THE COURT: Actually their policy is not
14 relevant other than as how to it was implemented. If
15 it is implemented and had an effect on the decedent,
16 it is relevant. Otherwise, it is not relevant. So
17 somehow you are going to have to limit his testimony
18 to documents that he has surveyed that were effected
19 prior to his death. I know it may make it difficult.
20 We may need to take a recess to do it.
21 MS. DESCHAMPS-BRALY: Could we do that so we
22 could have a moment to go over to do that?
23 THE COURT: Yes.
24 (The following proceedings were had IN OPEN
25 COURT.)



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1 THE COURT: Ladies and gentlemen, we will
2 take our midmorning recess at this time. We will
3 recess at this time for 20 minutes with our usual
4 admonitions to you.
5 Everyone remain seated while the jury exits.
6 Court will be in recess.
7 (A brief recess was here had.)
8 (The following proceedings were had OUT OF THE
9 HEARING PRESENCE OF THE JURY.)
10 MR. COATS: Judge, we find ourselves in this
11 situation. I have now reviewed the documents that
12 Mr. Braly was kind enough to show me the documents
13 that they have presented to this witness for his
14 testimony.
15 And 60 or 70 percent of them are documents
16 that either have not been admitted in evidence or
17 they are documents which if presented as exhibits
18 would not be admitted in evidence under the Court's
19 previous rulings in regard to projects that involve
20 products not used by the decedent in a time frame
21 which would have had no impact on him, consistent
22 with the Court's previous ruling.
23 Now, this ruling was made by the Court on
24 the motions in limine back before the start of the
25 trial. In spite of that, they delivered documents to



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1 the witness to use which, and I say the vast majority
2 of which are inapplicable because of the time limit
3 on which he has now based his opinion, and it is our
4 suggestion that that has so polluted his ability to
5 make an opinion that he shouldn't be entitled to
6 express one, and we would ask the court to instruct
7 him to go on to some other line with the witness and
8 with the mass of documents that he has there on which
9 he has utilized, which are not relevant and proper
10 evidence in this case, that they shouldn't be allowed
11 to pursue it.
12 MS. DESCHAMPS-BRALY: Your Honor, I have
13 just finished talking with the witness, and he
14 informs me that he can eliminate the documents that
15 are 1984 with no problem. He is still going to come
16 up with the same conclusions and the same opinion
17 from prior to 1984 documents that he has.
18 MR. COATS: That's the problem.
19 MR. FINNEGAN: That's the problem.
20 MR. COATS: That you can't do that, once you
21 have gone through all the documents.
22 MS. DESCHAMPS-BRALY: Come on, Mr. Coats.
23 MR. COATS: Go through there and take those
24 documents out, there is nothing left.
25 MR. BRALY: Your Honor, I know of no rule



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1 that this witness not be entitled to rely on the
2 kinds of information that a professional in his field
3 would normally rely on.
4 THE COURT: I agree completely so long as
5 it's evidence that occurred prior to 1984.
6 MS. DESCHAMPS-BRALY: And he says he has no
7 problem doing that. I have just talked to him.
8 MR. COATS: Why don't you pull everything
9 out of that book, that is either out for some other
10 reason or 1984 and later and see what is left, and
11 when you do that, it is obvious that he has to be --
12 THE COURT: What are you going to testify
13 about now, what's the --
14 MS. DANIA DESCHAMPS-BRALY: Well, he's going
15 to testify what's left of the direct that has to do
16 with the fact that they were aware that numerous ones
17 of their consumers were under age 18, the perceptions
18 that the consumers had as to the different brands of
19 U.S. Tobacco products, the fact that they -- how they
20 carried out their strategies that they were aware of
21 the health issue, what they did in response to the
22 health issue, and what they could have done
23 differently. That's all that is left of direct.
24 MR. BRALY: There is a 1960 -- excuse me,
25 there is a 1968 document that quotes the present


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1 chairman of the board who was then a vice-president
2 in charge of marketing that they intended to market
3 to young people and to create a fad.
4 There is a 1972 document that says they
5 intended to market to 15-year olds, a whole string of
6 documents in there, Judge.
7 MS. DESCHAMPS-BRALY: Now, Your Honor, we
8 have no problem with the dates. We do have a problem
9 if he is not going to be allowed to refer to any
10 other product, because, as I have said, that is not
11 possible, it is an integrated marketing strategy, and
12 if, you know, if Your Honor is going to rule that he
13 can't refer to any of the other products as part of
14 the basic marketing strategy, then, what we need to
15 do is --
16 THE COURT: I have said advertising in
17 regard to other products that was available to the
18 decedent is relevant.
19 MS. DESCHAMPS-BRALY: Okay.
20 THE COURT: But, again, it's -- well, I just
21 want it limited to prior to 1984 and --
22 MR. BRALY: Well, for instance, Your Honor,
23 some of these documents, one of them documents is a
24 1984 document, but it incorporates in the document
25 data that was accumulated from 1980 to 1982. And, as



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1 a matter of fact, from memory, the 80-82 data was set
2 out in an earlier document in the company and then
3 was incorporated in this '84 document. There wasn't
4 any reason to send the man both documents.
5 So there are, you know, there are isolated
6 examples of that sort of thing. This witness will
7 tell you that his marketing plans that show up with a
8 document in 1984, were plans that based on his
9 experience were created a year or more before that.
10 THE COURT: Again, I don't even think that
11 is relevant, though, as long as it wasn't
12 effectuated. It is the impact on the decedent that I
13 think we are interested in today.
14 MS. DESCHAMPS-BRALY: Aren't we also talking
15 about the intent of the company here?
16 THE COURT: I don't care how bad evil intent
17 they had, if it didn't have an impact on the
18 decedent, it is not relevant to this trial.
19 MR. COATS: And, Your Honor, the things they
20 are saying either are in documents that are in
21 evidence or are not and they are not anything over
22 which he needs to base an opinion. It doesn't reach
23 his opinion. The documents that talk about marketing
24 strategies are those which are dealing with products
25 that Sean didn't use and that occurred after Sean's



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1 death.

2 Now, that's, excuse me a minute. I think as

3 I understood the question he was asking him, what was

4 his opinion of the marketing strategies and

5 procedures of the company. And if you look at the

6 documents, those documents are things that happened

7 for other products after Sean Marsee was gone.

8 MR. FINNEGAN: Or diagnosed.

9 THE COURT: All I know to do is in your

10 questioning limit your questions to questions to 1984

11 and exclude any consideration of any documents that

12 were prepared and disseminated after his death.

13 MS. DESCHAMPS-BRALY: You understand that,

14 Doctor Cagley, don't you?

15 THE WITNESS: The date of his death was

16 1984?

17 THE COURT: Yes.

18 MR. BRALY: We would like to make an offer

19 of proof, Your Honor. That the witness, if allowed,

20 would testify more fully, more completely, therefore,

21 more persuasively, based upon further documents some

22 of whose dates appear after 1984.

23 Those documents reflecting the intent of the

24 U.S. Tobacco Company to market to young people. And

25 the plaintiff objects to this witness being limited.



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1 in the scope of his opinions based upon an arbitrary
2 time limit as to when the documents were dated so
3 long as the documents represent the understanding and
4 knowledge of the company.
5 MR. COATS: And, Your Honor, we of course
6 ask that he purge his files of any documents after
7 1984 that places us in the posture of having to find
8 some way to cross-examine about documents that are
9 not properly in the case. I mean if he can give us
10 his testimony based on documents that are not
11 properly here, we suggest that he -- the strategy
12 documents are all those that are already in products
13 that were not used by Sean and are after that time,
14 that his testimony can't be properly segregated, that
15 this situation was created by plaintiff's sending
16 them documents which were not proper and that he
17 shouldn't be allowed to go forward and express an
18 opinion.
19 MS. DESCHAMPS-BRALY: Your Honor, so far as
20 I understand it, there have been two occasions when
21 we would have had to come up to the bench because it
22 was a 1984 document, and that's been it. He's going
23 to testify to no further 1984 documents. I don't
24 understand what Mr. Coats problem is. He will be
25 perfectly able to cross-examine on the testimony that


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1 he is going to hear.

2 THE COURT: Let me ask, Doctor, are you

3 capable, I know you have been exposed to documents

4 that were disseminated and prepared subsequent to the

5 death of Mr. Marsee.

6 Are you able to form an opinion based solely

7 on documents that came from the files of the tobacco

8 company that were prepared prior to that time and

9 exclude from your opinion those other documents?

10 THE WITNESS: Yes.

11 MR. COATS: Your Honor, could we ask them to

12 tell us which documents then he relies on? Of those

13 in front of him.

14 THE COURT: Yes.

15 MR. COATS: Before we get into it?

16 THE WITNESS: Oh, okay.

17 MR. BRALY: Your Honor, let me point out one

18 other thing. The rule says quite expressly that the

19 expert witness does not have to base his opinion upon

20 admissible documents. There is no requirement for

21 that in the rules. This is a continuing effort on

22 the part of the tobacco company to slice this onion

23 thinner and thinner and thinner, and they have been

24 very successful at it so far, but the rule expressly

25 says that this man can base his opinion upon matters,



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1 whether they are admissible or not, and --.

2 MS. DANIA DESCHAMPS-BRALY: If it is a

3 matter that an expert in his position would

4 ordinarily rely upon.

5 THE COURT: It has got to be relevant

6 evidence, though, and to base it on -- I have ruled

7 on that. Let's don't go on.

8 MS. DESCHAMPS-BRALY: Note our objection.

9 (An off-the-record side bar conference was here

10 had.)

11 MR. BRALY: The first document identified as

12 plaintiff's Trial Exhibit 308. It is a U.S. Tobacco

13 Company Skoal Bandits spot television schedule. The

14 significance of the document is that it represents

15 the continuing activities in the 1983 of the U.S.

16 Tobacco Company to market to young people by use of

17 marketing medias, such as the A-team and the Fall Guy

18 on television.

19 This is a continuation of the strategy that

20 is reflected in a 1968 and a 1972 document which we

21 will come back to later, which the company in 1968

22 expressed the intent to market to young people and in

23 1972 expressly stated that they intended to market to

24 15-year olds.

25 THE COURT: What is the number of that, Mr.



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1 Braly?

2 MR. BRALY: Plaintiff's Exhibit 308.

3 THE COURT: Irrespective, it is admitted as

4 an exhibit. It is an appropriate document to base an

5 opinion on.

6 MR. COATS: We object to that because Skoal

7 Bandit was not a product that was marketed until the

8 fall of 1983, some months after Sean Marsee was

9 diagnosed. At the time he was not using smokeless

10 products. It concerns a product which he never used

11 and which was never formally marketed until after his

12 -- after he quit using the product.

13 THE COURT: Sustain the objection.

14 MS. DESCHAMPS-BRALY: The next one is

15 Plaintiff's Exhibit 3 -- note our objection, Maynard,

16 continuing objection on the ones that are --

17 THE COURT: You can assume if I sustain it

18 you have got an exception.

19 MS. DESCHAMPS-BRALY: Plaintiff's Exhibit

20 309. This is a document prepared by David Weiss and

21 Associates to U. S. Tobacco Company, dated May 13,

22 1982, entitled "Qualitative Consumer Exploration of

23 Moist Smokeless Tobacco Advertising and Brand

24 Perceptions." Relevant altogether, particularly, on

25 Page 24 thereof. The middle paragraph where it is



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1 talking about perceptions of product strength and,
2 particularly, where it refers to Copenhagen as
3 universally regarded as the end of the line for
4 experienced dippers.
5 MR. BRALY: Go to the next page, Your Honor.
6 Page 25 at the bottom. Dippers are convinced the
7 product is safer than smoking cigarettes.
8 THE COURT: Where do you see that, I'm
9 sorry.
10 MS. DESCHAMPS-BRALY: The very last
11 paragraph, Your Honor, the medical issues a constant
12 influence on category image, all brands are seen the
13 same and dippers are convinced that the product is
14 safer than smoking cigarettes.
15 MR. COATS: Let me here that. If Your Honor
16 please, this one is in within, I believe, to the time
17 frame that is permissible. However, we object to it
18 on the basis that it is a document not prepared by
19 the United States Tobacco Company, but prepared by an
20 independent marketing consultant on the same basis
21 that you have made the other. This is simply these
22 folks went out in the field and made a report back to
23 the company and we obeject to it, and it is not--
24 MS. DESCHAMPS-BRALY: And it refers to the
25 company and he had notice what was going out there in



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1 the world.

2 MR. BRALY: This is what was testified to

3 and this is exactly the kind of research that these

4 companies hired done for the company.

5 THE COURT: Well, I don't know, and you all

6 can guide me, if a company hires somebody to do

7 something for you, are you bound by what they say?

8 Is that admissible against you as an

9 admission.

10 MR. BRALY: If this expert says this is the

11 kind of information that companies customarily rely

12 upon, which this witness has told us at least in a

13 private conversation, that it is a kind of

14 conversation that he had experience with for six

15 years out in the industry and that condition there it

16 is a business record; they do these routinely and

17 they keep them --

18 THE COURT: A business record is one that is

19 generated by the business, itself.

20 MR. BRALY: No. It is generated by somebody

21 with knowledge that matters.

22 MS. DESCHAMPS-BRALY: There's two points

23 here. No. 1, they had somebody do this for them.

24 Okay. He needs to be able to testify that certain

25 recommendations were made to them. In turn, did they



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1 act on them. Okay. That's the next question. Aside
2 from that, you have got somebody out here that's gone
3 and done research for them and is telling them, hey,
4 folks, the people out there are perceiving that all
5 of your brands are safer than cigarettes, and they
6 know this. The people out there are perceiving that
7 Copenhagen is the strongest stuff, it is the end of
8 the line. The company knows that. They are on
9 notice, irrespective of anything else from what is
10 delivered to them from the people they have employed
11 to go out and do research for them.
12 MR. COATS: Of course, our objection on
13 this, this is an independent contractor who goes out
14 and reports matters back to us and they are trying to
15 use it as something that is binding on corporate
16 strategy, which is just what he is talking about and
17 it is not corporate strategy, it is not statements
18 from officers, it is, indeed, a report we received
19 from an independent contractor.
20 MS. DESCHAMPS-BRALY: The only way it is
21 binding if they act on it.
22 THE COURT: I am going to overrule the
23 objection. I think it would be relevant if you hire
24 a contractor to go out and they come back and tell
25 you that consumers think your product is safer than



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1 cigarettes and you can continue -- and in spite of
2 that, you have got evidence to the contrary and you
3 continue to sell the product with evidence to the
4 contrary, if believed, I am not commenting on the
5 value of the evidence, but I think it would be
6 relevant on the state of mind of the defendant.
7 So --
8 MR. COATS: Next item.
9 THE COURT: Plaintiff's 309 will be -- No, I
10 am not going to admit the entire thing.
11 MR. FINNEGAN: He can refer to it, is that
12 the Court's ruling?
13 MR. COATS: No, he's going to offer it into
14 evidence.
15 MR. FINNEGAN: He's going to offer it into
16 evidence.
17 MR. COATS: Yes.
18 MR. BRALY: Your Honor, we will try to
19 expurgate it.
20 THE COURT: Let's do that.
21 MR. BRALY: At least those two pages are
22 important. I think there are some other passages
23 that he plans to reoffer to.
24 THE COURT: Let's take that out and you can
25 put the front cover of it on there and join it with



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1 those two pages.

2 MR. COATS: I think we may want the whole

3 document, we will look at that on your ruling, maybe

4 we will want all of it.

5 MS. DESCHAMPS-BRALY: They just said they

6 want the whole thing in.

7 MR. COATS: We will look at it and see.

8 THE COURT: Right now, I am saying objection

9 overruled to 309.

10 MR. BRALY: The witness says there are a

11 number of passages he relied on in this document,

12 more than what I had guessed.

13 MR. COATS: Let's go to the next one.

14 MR. BRALY: "Nothing to sniff at" is the

15 next document, Your Honor. That's a publication in a

16 national magazine, quoting the chairman of the board

17 of the United States Tobacco Company in 1980. This

18 witness will testify that that's the kind of

19 information about the activities of the company that

20 a person in his position would customarily rely

21 upon.

22 THE COURT: He would rely on the article?

23 MR. BRALY: Rely on the quotations in

24 reputable business magazines, yes. In addition,

25 it is not as quite as bizarre as you might see. The



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1 company has stipulated that a virtually identical
2 quotation in 1977 of the chairman of the board that
3 if the newspaper reporter was called that he would
4 testify that the chairman of the board made that
5 statement. It is almost an identical statement.
6 That is a stipulation that has already been entered
7 in this case.
8 THE CLERK: What's the number?
9 MR. FINNEGAN: We still object to that Your
10 Honor.
11 MS. DESCHAMPS-BRALY: Plaintiff's Exhibit
12 154.
13 MR. FINNEGAN: We object to that on the
14 grounds that it is from a publication and it is
15 hearsay.
16 THE COURT: Didn't you inquire about this
17 quotation of Mr. Bantle.
18 MR. COATS: Yes.
19 MR. BRALY: Yes.
20 THE COURT: The deposition.
21 MR. BRALY: No, in the deposition, it was an
22 earlier -- yes, I think I inquired about both of them
23 in his deposition. He didn't deny making either one
24 of them.
25 THE COURT: Do you all disagree with that.



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1 MR. COATS: No.

2 MR. JENNINGS: That's true.

3 MR. FINNEGAN: That's true.

4 THE COURT: All right. I will overrule your

5 objection to -- when was this, this is -- well,

6 that's 310 -- oh, it is 1980.

7 MR. COATS: 1980.

8 THE CLERK: 154, Judge.

9 MS. DESCHAMPS-BRALY: Plaintiff's Exhibit

10 154.

11 THE COURT: 154?

12 MS. DESCHAMPS-BRALY: That's what it says

13 here.

14 MR. BRALY: Yes.

15 THE COURT: Okay.

16 MR. BRALY: The next exhibit is Plaintiff's

17 Exhibit 158.

18 MR. COATS: The Lotus Project, Your Honor,

19 you have already ruled on that and saying at this

20 point this was out. This was, if you recall, a

21 project was started by Mr. Bantle's father in which

22 the Swedish Tobacco Company, which is a

23 government-owned tobacco company in Sweden, was

24 undertaking a tea bag project. If you will notice

25 the document here is simply a -- Hand me that big



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1 exhibit you have there, the Lotus Project, or The
2 Lotus Project, that is the same thing, and the thing
3 that is important about it, Judge, is, if you will
4 look at the bottom.
5 MR. BRALY: This is what they are most
6 afraid of Judge.
7 THE COURT: You see that U.S.I. across that,
8 that's United Scandia International, which is a
9 Swedish Tobacco Company. This was a copy of the
10 project as outlined by the Swedish Tobacco Company,
11 which is a governmental -- government-owned tobacco
12 company in Sweden, and it has nothing to do with
13 these procedures. It developed into a portion pack,
14 which Sean never used, called Good News or Good
15 Luck.
16 MR. FINNEGAN: If the Court please, in this
17 right here, it talks about this is a product and a
18 project of the Swedish Tobacco Company. The Swedish
19 Tobacco Company the people came over to the United
20 States and were telling U. S. Tobacco about this
21 project, which was a Swedish tobacco company
22 project. That's what it says here. Mr. Bantle then
23 wanted to get a similar type of product, and that was
24 the Skoal Bandit, which came along a decade later it
25 is quite clear that this here was something that the



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1 Swedes brought over to us. This is United Scandia
2 International. This is not United States Tobacco
3 Company.
4 MR. BRALY: Judge, wait a minute, wait a
5 minute. Wait just a second.
6 MR. FINNEGAN: And also if the Court
7 please --
8 THE COURT: If you all wouldn't talk at the
9 same time --
10 MR. FINNEGAN: If the Court please, I think
11 it is relevant that out of all of the documents that
12 have been produced, there is not one indication in
13 any of those documents, that they ever targeted 15 to
14 35 years old. That is why they find it so
15 significant. That is the only document in the
16 millions of pieces of paper that have been produced,
17 this is the not a document of U.S. Tobacco Company.
18 MR. BRALY: Judge, I would like to be heard
19 on this just a minute. If you look at this, there is
20 a whole series -- these are not the whole document,
21 there must be a half inch stack of paper on this
22 subject. Their own witness has testified that United
23 Scandia International was a joint venture between the
24 United States Tobacco Company and the Swedish Tobacco
25 Company. This is not some third person's



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1 activities. This is this company's partnership
2 activities to develop a new portion-pack product.
3 THE COURT: In Sweden?
4 MR. FINNEGAN: In Sweden.
5 MR. BRALY: No.
6 MR. FINNEGAN: By Swedish Tobacco Company,
7 it says here on the second line, that is
8 government-owned monopoly, and they set whatever
9 studies they want in Sweden.
10 MR. COATS: All the company wanted to do was
11 monitor that project.
12 MR. BRALY: To accomplish this rapid
13 development of the Lotus Project, Mr. Bantle declared
14 that he wanted to set up a task force with the
15 following participates which included the company.
16 The meeting was held in the offices of Mr. Bantle in
17 Greenwich, Connecticut. United Scandia International
18 has offices in the same building and as the Court can
19 see, looking at one of the other documents right
20 there, United Scandia International was drafting
21 these Lotus Project documents on United States
22 Tobacco Company's stationery. You just can't say
23 that this is not the intent of the United States
24 Tobacco Company.
25 MS. DESCHAMPS-BRALY: Our expert has just



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1 handed me a note, one of the notations he had -- no,
2 this was one of the notations he had to testify
3 from -- don't laugh, Mr. Finnegan -- from 7-10-72.
4 Mr. Bantle further declared that he wanted a Lotus
5 Project for the United States market, should not be a
6 Copenhagen or Skoal.
7 MR. FINNEGAN: That's right.
8 MS. DESCHAMPS-BRALY: That's a joint
9 venture.
10 MR. FINNEGAN: It became the Skoal Bandit in
11 1983, Your Honor.
12 MR. COATS: That's right.
13 MR. FINNEGAN: That is exactly what they
14 started out to develop, but the Lotus Project was a
15 project of the Swedish Tobacco Company that is a
16 government monopoly and that is what that is all
17 about. And that says that in the documents.
18 MR. BRALY: Judge, let them bring a witness
19 to the courthouse that can be cross-examined. That's
20 a good line of cross-examination. But in the
21 meantime, this is a document that is in the company's
22 files, it is attached to documents in the company's
23 stationery --
24 THE COURT: Let's skip that for a minute.
25 What is the exhibit number on that?



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1 MS. DESCHAMPS-BRALY: 158 and 199.
2 THE COURT: Why is it two exhibits?
3 MR. BRALY: There are two different
4 documents.
5 MS. DESCHAMPS-BRALY: There are two
6 documents.
7 MR. BRALY: A series of two different
8 documents.
9 THE COURT: Plaintiff's 158 and what was the
10 other one?
11 MR. BRALY: 199.
12 THE COURT: The Lotus Project. Nancy, why
13 don't you just tell the jury what that it will be --
14 Go ahead and go to lunch -- and it will be say 1:30.
15 All right. What's next?
16 MR. COATS: That is part of the same
17 document.
18 MR. BRALY: This is just a journal article,
19 Your Honor, in 1981.
20 THE COURT: What is the number of that?
21 MR. BRALY: It's Plaintiff's Exhibit 313.
22 MR. COATS: Now, Your Honor, we object, this
23 one going into evidence, but we do think he can refer
24 to it. In other words, it is one of these situations
25 where you have -- a learned article that he was



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1 trying to refer to but shouldn't go into evidence, we
2 resist it to going into evidence, but we think he can
3 refer to it.
4 THE COURT: Do you agree with that?
5 MR. BRALY: Yes, we agree with that.
6 MR. COATS: We have an objection, it can go
7 in, but he can refer to it.
8 MR. BRALY: Except to the extent that it
9 puts them on notice, Your Honor. It is clearly
10 another one of these notice series articles in 1981.
11 THE COURT: What does it put them on notice
12 of?
13 MR. BRALY: Well, that their advertising
14 campaign is designed do appeal to young impressional
15 young males, for one thing, right there on the first
16 page.
17 THE COURT: If that is their plan, it
18 wouldn't put them on notice.
19 MR. BRALY: Well, Judge, if it --
20 THE COURT: I will sustain the objection.
21 You can comment on it, as far as an opinion.
22 MR. BRALY: All right. The next one was --
23 THE COURT: That's Plaintiff's 313.
24 MR. BRALY: The next one, that is the famous
25 Chicago Tribune article, in which the chairman of the



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1 board says "We've gotten excellent sales growth from
2 young people." Mr. Bantle states, "in Texas today, a
3 kid wouldn't dare go to school even if he didn't use
4 the product, without a can in his Levis."
5 THE COURT: I thought we already had that
6 in, that quote.
7 MR. FINNEGAN: That's in.
8 MR. BRALY: Yes, theoretically it should be
9 in evidence from Mr. Bantle's deposition.
10 THE COURT: Well, is there anything -- what
11 do you want this for?
12 MR. BRALY: He's going to rely on it and
13 read from it.
14 THE COURT: But I thought we already had it
15 in with another one.
16 MR. BRALY: Some three years later he said
17 it again, judge.
18 THE COURT: Well, --
19 MR. BRALY: This guy didn't just know it, he
20 knew it--
21 THE COURT: What is the number of that?
22 MR. BRALY: This one is 152.
23 THE COURT: 152. All right. The same thing
24 on 152, he can use that as a basis of an opinion.
25 THE CLERK: It is admitted?



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THE COURT: No.

MR. BRALY: 141.

MR. FINNEGAN: That is the Hawken document?

MR. COATS: Yes.

MR. BRALY: This document is a very interesting document.

THE COURT: What is the number of you it, Mr. Braly.

MR. BRALY: It is Exhibit No. 141, to use in Mr. Bantle's deposition. It is a 1980 document, it is on intracompany correspondence stationery. It talks about young people on the second page at the top, Your Honor.

THE COURT: Do you all object to this.

MR. COATS: Yes, on the basis it is Hawken, which is a product that we don't make and we didn't market and Sean didn't use.

MR. FINNEGAN: That is made by another manufacturer, Your Honor.

MR. BRALY: Judge, you got to read the article. We are clearly talking about their products here. What they are saying is in this document is that the retailers have noticed that kids as young as nine years old are using Hawken and this has cut into their Skoal sales. Finally down at the bottom there



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1 is a highly pertinent quote, when after having stated
2 that kids as young as nine years old use the product,
3 he says, the sales person, who is an employee of U.S.
4 Tobacco Company says, "I think this brand has reached
5 kids four or five years earlier than we have
6 contacted them in the past." If they are nine years
7 old and they reached them four or five years old,
8 simple arithmetic indicates that U.S. Tobacco has
9 been contacting people at age 14 and 15.
10 MR. FINNEGAN: Okay. If they are 14 and 15,
11 and it is five years earlier, then that would put us
12 at about 18 or 19, Mr. Braly.
13 THE COURT: Well, I think that's a
14 reasonable argument, so I will admit it. Plaintiff's
15 141 the Hawken Review. Okay. What's next?
16 MS. DESCHAMPS-BRALY: Your Honor, the next
17 one is Plaintiff's Exhibit 142. Now, this is dated
18 June 29, 1984, but if you will read the sentence that
19 starts about on the fifth line, it is an admission of
20 something that has been happening prior to '84 where
21 the company representative in this memorandum says
22 "A lot of our consumers are under 18 years of age and
23 have been users of smokeless tobacco for years and
24 now they are being turned down."
25 So although it is dated '84, it is referring



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to things that have happened in the past and admitting that they have known that under 18 year olds have been their consumers for a long time.

MR. FINNEGAN: I don't think anybody in the company has ever denied that we knew that there were people out there under 18 using the product.

MR. BRALY: Good, then why didn't you stipulate to it?

MR. COATS: The problem, we can't control the sales, we can control the distributors to retailers, but not to sales. We know they changed the law in Kansas, --

THE COURT: Let me read it. I will admit -- what is the number.

MS. DESCHAMPS-BRALY: 142, Your Honor.

MR. BRALY: The next one is 157.

THE COURT: I don't think that that would be relevant.

MR. BRALY: I don't care about that.

THE COURT: Let's excise that, unless you want it in there.

MR. COATS: I can't see what it is.

THE COURT: It is the law, that's what it is, sets out the law in 1984 in Kansas; I don't think it is relevant.



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1 MR. BRALY: I don't care one way or another.
2 THE COURT: Okay. We will excise that.
3 MR. BRALY: Done.
4 THE COURT: Next is some minutes of a 1968
5 meeting in the New York Hilton.
6 MR. COATS: No objection, Your Honor.
7 MR. FINNEGAN: No.
8 THE COURT: All right. What is the number
9 of that?
10 THE CLERK: The minutes.
11 MR. BRALY: It is 157.
12 THE COURT: It may be admitted.
13 MR. BRALY: The next one --
14 MS. DANIA DESCHAMPS-BRALY: The next one,
15 Your Honor, is Plaintiff's Exhibit 318. Now, this is
16 dated June 17, 1984, but we are offering this under
17 Rule 803 (8) public records. This is a finding from
18 the Attorney General of the State of New York, where
19 he filed an action against the U.S. Tobacco Company
20 because they felt that the -- to take a pinch instead
21 of a puff was an implication of safety.
22 MR. FINNEGAN: Take a pouch, this case,
23 Skoal Bandit.
24 MR. COATS: Skoal Bandit 1984, it has no
25 relevance.



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1 THE COURT: I will sustain the objection to
2 it.
3 MR. FINNEGAN: What is the number.
4 THE COURT: What is the number of that, 318?
5 MS. DESCHAMPS-BRALY: 318.
6 MR. BRALY: Note our offer of proof, Your
7 Honor.
8 The next one is 319. That's a related
9 document to the previous document, Your Honor. This
10 one was the company's response to being told that
11 their advertising was deceptive by the State of New
12 York.
13 MR. COATS: Well, that all deals with Skoal
14 Bandits.
15 THE COURT: Is there something in here
16 particularly you want to point out me that would make
17 it an exception to the date rule?
18 MS. DESCHAMPS-BRALY: It is basically the
19 same thing, Your Honor, it is a finding by a
20 governmental agency that they are advertising --
21 what's the word?
22 MR. BRALY: Well, Judge, what it amounts to,
23 it is just a statement that was made prior to the
24 commencement of this lawsuit by the Attorney General
25 of the State of New York about the deceptive



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1 advertising and the Attorney General of the State of
2 New York found that it was, this was the company's
3 response in changing their advertising. You know,
4 that, to me, would be the sort of thing that a
5 marketer would pay attention to is the actions of the
6 Attorney General of the State of New York.
7 THE COURT: I will sustain the objection.
8 MR. BRALY: The next document is Exhibit No.
9 320, is the --
10 THE COURT: You object to it?
11 MR. COATS: Yes, I would like to see it. I
12 can't tell you right now.
13 (Handed to counsel).
14 MR. BRALY: Your Honor, this is the actual,
15 the initial document that commenced a major effort in
16 the early 1983 of the company to try and respond to
17 the health controversy. This document was written by
18 senior vice-president with respect to this broadcast
19 and went to the chairman of the board, went to the
20 strategic management committee and precipitated a
21 number of other documents that arose during the week
22 of January 17th, some of which are already in
23 evidence.
24 MR. COATS: Your Honor, this has no bearing
25 on marketing. It has to do with petitioning Congress


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1 of the United States and lobbying efforts, and I
2 suggest you keep this particular one in abeyance
3 until you have had a chance to look at it. There is
4 one that is dealing with our Congressional efforts
5 and other things and we think the law is pretty clear
6 that any evidence regarding our lobbying efforts or
7 efforts of that kind is not first amendment right
8 petitioning and lobbying efforts are not admissible.
9 We have got some pretty strong authority on that
10 point we would like to submit. I think that maybe
11 that is an issue that you might want to reserve on.
12 I don't know that it is critical for his talking
13 about lobbying and not marketing. I don't know that
14 it is critical to his kind of --
15 THE COURT: Certainly, you have got the
16 right, I will look at your brief.
17 MR. COATS: Yes, we will look at.
18 THE COURT: Certainly, you have got the
19 right to lobby, but the fact you want to make an
20 effort to keep a warning off of your product, if, in
21 fact, a warning was needed, why wouldn't that be
22 relevant?
23 MR. COATS: Well, it is not a question of
24 relevancy; it is a matter of exercising the First
25 Amendment rights and the ability of the court to


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1 impact on that. Courts have gone a long way, Judge,
2 in saying you have got the right to petition to deal
3 with government officials to lobby to do everything
4 you need to do, as it affects your economic
5 interests, only, and those rights are all protected
6 from any involvement in damage suits or anything
7 else, and you do. I just handed George this morning
8 a copy of that brief. I am letting you look at it.
9 I just urge you to hold your reading on that until
10 you can read it.
11 MR. BRALY: As to that issue, whether this
12 expert would rely upon the company's statements that
13 they were further intending to do everything they
14 could to keep warnings off the product is certainly a
15 proper basis for his opinion. That they were doing
16 everything they could to hide their marketing. No.
17 1, to promote snuff as a safe alternative, the
18 cigarettes, and to do this by keeping warnings off
19 it.
20 MR. FINNEGAN: If the Court please, whatever
21 was done in 1983, irrespective of the First Amendment
22 question, it has no effect on Sean Marsee.
23 MR. BRALY: He continued to use snuff in
24 January of 1983, until Carl Hook saw him in April,
25 Mr. Finnegan. How much thinner do you want to slice



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1 the onion.

2 MR. FINNEGAN: The Court's opinion a person

3 and a court has a right to petition government and

4 that if we are successful in petitioning government

5 in our lobbying activities, then, that cannot be used

6 in a damage suit adversely to us.

7 THE COURT: Maybe I better read it.

8 MR. FINNEGAN: Thank you, Your Honor.

9 MR. COATS: Hold that one.

10 THE COURT: I would just hold 320 in

11 abeyance.

12 MR. BRALY: The next one is 194.

13 THE COURT: Plaintiff's 194?

14 THE CLERK: Yes.

15 MR. BRALY: This is one of the those

16 documents, Your Honor, that included surveys from

17 1980 and 1982. Within this survey there is another

18 similar document someplace in the company's files

19 that reported just the 1980 and '82 results, but this

20 one, if you look at, for instance, Page 8 the reports

21 results for 1980 an 1982, and it is clearly

22 historical information.

23 THE COURT: What is the relevance of this?

24 MR. BRALY: It went to show who was using,

25 how much was using it; it shows the market trends,



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1 who was buying it, where they were buying it, and
2 what.
3 THE COURT: Does it show that children were
4 using it?
5 MR. COATS: I don't believe it does.
6 MR. BRALY: I think it shows that Sean
7 Marsee was one of the targets because they were
8 targeting rural and blue collar persons.
9 THE COURT: How does this help his
10 testimony.
11 MR. BRALY: I think he frankly already
12 testified from this document.
13 THE COURT: I think he probably has, too.
14 What is your objection on it?
15 MR. COATS: Well, we just went through it
16 again. It is primarily compiled and put together
17 after the time Sean Marsee--
18 THE COURT: He has testified -- as far as
19 the exhibit itself. I will sustain the objection to
20 it going into evidence.
21 That is U.S. Tobacco --
22 MR. FINNEGAN: This was the one that has the
23 financial information in the back.
24 MS. DESCHAMPS-BRALY: Are you still on 321?
25 THE COURT: Is this 321?



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1 MS. DESCHAMPS-BRALY: The one you were just
2 going through.
3 MR. COATS: No, it was sustained..
4 THE CLERK: 194.
5 MS. DESCHAMPS-BRALY: All right. The next
6 one is Plaintiff's Exhibit 322.
7 THE COURT: Is that what this is right here?
8 MS. DESCHAMPS-BRALY: Yes, sir. This one
9 shows a history during the relevant period from
10 '76 to '81 that Sean Marsee was using, it has got
11 marketing data and here it shows the increase in
12 their sales and so forth, the areas of the country
13 that were targeted.
14 MR. COATS: I thought sales stuff was ruled
15 out, Judge.
16 MR. FINNEGAN: I think that's the portion
17 that we have particular objection to.
18 THE COURT: What is the relevance of this,
19 as far as the psychologist is concerned?
20 MS. DESCHAMPS-BRALY: He is not just a
21 psychologist, a marketing expert.
22 THE COURT: A marketing expert. What is the
23 relevancy.
24 MS. DESCHAMPS-BRALY: It shows the strategy
25 of the strategies they were using, their sales were



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1 consistently going up. Look at the difference.
2 MR. COATS: That shows a 18-plus population.
3 MS. DESCHAMPS-BRALY: What they are saying
4 here every single solitary male over the age of 18
5 years was using 3.4 cans. Now, we know that
6 everybody in the United States isn't using so there
7 is a heck of a lot more people using within the
8 limited sphere of snuff users than what is reflected
9 here. This is just -- shows consumption. If you are
10 assuming that every male is consuming.
11 THE COURT: What is the relevance?
12 MR. BRALY: Judge, it is something that he
13 used in forming his opinion that this company was
14 very, very, highly successful with their marketing
15 efforts that it included young people. You take this
16 data and you combine it with the Bogalusa data, and
17 you get a picture of young people starting, combine
18 it with that letter a minute ago, the Hawken letter,
19 a minute ago, and you get a particular picture of a
20 company that is deliberately marketing to young
21 people. This shows the results as those people get
22 older, it shows the increase over a period of time,
23 and it is the kind of fundamental report on what the
24 company is doing in marketing that somebody would
25 want to see before they opened their mouth and talked



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1 on the subject.

2 THE COURT: So you want him to be able to

3 show that their advertising has been successful.

4 MS. DESCHAMPS-BRALY: And the areas of the

5 country that were being targeted and there is moist

6 smokeless tobacco, it was the thing, that they were

7 hitting on hardest and not only were they hitting on

8 the hardest, but it was almost successful. It

9 worked. The money they spent on it was successful.

10 MR. BRALY: In other words the chairman of

11 the board testified in his deposition that they

12 started advertising with smokeless tobacco, and took

13 advantage of television ads on cigarettes in 1971.

14 THE COURT: My trouble in this, is how is

15 that relevant to the lawsuit.

16 MS. DESCHAMPS-BRALY: Because Sean is a

17 consumer.

18 THE COURT: We know he consumed it.

19 MS. DESCHAMPS-BRALY: Right.

20 THE COURT: We got advertising, and he

21 bought it, and he was -- he did it at 12 years old.

22 What difference does it make that we have got

23 research here which shows what has been happening

24 around the world.

25 MS. DESCHAMPS-BRALY: Well, I think it is



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1 very relevant because if Sean Marsee was 12 years old
2 and he went out searching the product on his own, but
3 maybe that is not U.S. Tobacco's fault, but if they
4 are out advertising and promoting the product in such
5 a way that it encourages the consumer here, take it,
6 use it, that is a whole different story.
7 MR. BRALY: Judge, this is a national
8 company, it is a national marketing. I wouldn't
9 expect us to find a document that would refer to
10 Talihina, Oklahoma in their files. I would expect to
11 find documents that summarize their marketing
12 activities from around the country?
13 A. That is the sort of thing an expert would
14 have to rely upon to form an opinion.
15 THE COURT: To show that their advertising
16 is successful?
17 MR. BRALY: Yes, sir. That they, you know,
18 the tobacco industry maintains that advertising
19 doesn't do anything except affect brand changes.
20 MR. COATS: Judge, the other aspect of that
21 is that the evidence is clear that he got it from the
22 sample and not from advertising. And it has in it,
23 of course, all of the data about sales, and that sort
24 of thing that the Court has excluded.
25 THE COURT: Let me tell you what I am going



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1 to do on that. By the way, I can tell you now, as
2 far as the punitive damage issue, I have read, I
3 believe, all the cases that are relevant on it and
4 probably the most valuable one is -- it is one cited
5 by the defendant.
6 It is an Illinois case, I believe, I can't
7 remember the name of it right now, I will cite it,
8 and it suggests that circumstances depend -- whatever
9 the circumstances are, it is not a hard and fast rule
10 on whether or not you should limit punitive damages
11 to the assets of the company or to include profits
12 made by the company. And in that particular case, I
13 believe they limited it to the assets, and would not
14 let it go into profit. I think given that case, plus
15 the Terry case and the circumstances of this case, I
16 think profits will be relevant.
17 Let me tell you why. If you have a car
18 wreck case, say, and an individual is grossly
19 negligent that is drunk and you sue the corporation,
20 that is the employer, I don't think in that instance
21 the income over a period of years of a company would
22 be relevant.
23 Here where you have a product liability case
24 and as the Terry case says, you are part of the thing
25 that the jury is to consider is other sales, you


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1 would have to show what those sales were and income
2 was from the product that is alleged to be defective,
3 and for that reason, I intend to allow in profits.
4 So, also, obviously, I think also the assets
5 would be relevant and the jury would have both.
6 MR. COATS: But sales and profits are a
7 whole different proposition, Your Honor. Sales, of
8 course, are gross numbers and the profits are
9 substantially different. So again we renew on the
10 amount of sales, because sales --
11 THE COURT: Why do you care?
12 MR. COATS: Well, I think it is an enormous
13 number of the sales and certainly, if you are talking
14 about profit, it is a much lower number in terms of
15 quantitative --
16 MR. FINNEGAN: It is our position that they
17 can't show sales.
18 MR. COATS: In addition to that it simply
19 doesn't add anything in the case. He can give his
20 impressions that whatever he attributes to
21 advertising, whatever success the company has had,
22 this document doesn't add or detract in any way from
23 it.
24 THE COURT: I'll tell you what I will do on
25 this. I think it would be, I think you can base an



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1 opinion on it. I am not going to let the document
2 itself in, but I will let him express an opinion
3 based on review of that document, that they have been
4 successful. Sustained as to the document. Going to
5 allow testimony.
6 MR. COATS: We won't be able to read and
7 quote from the document, just simply base it for his
8 opinion. If he goes through and reads the number, he
9 reaches the same result.
10 THE COURT: That's right.
11 MR. BRALY: 323.
12 MS. DESCHAMPS-BRALY: Your Honor, the
13 importance of this is down -- oh, you are seeing it
14 down there where it is underlined at the bottom. It
15 says it is perceived as a healthier product.
16 THE COURT: What is the relevance of this?
17 MR. BRALY: Goes to the health issue, Judge,
18 and their knowledge and their efforts to deceive
19 people into thinking that snuff is safe.
20 MS. DESCHAMPS-BRALY: That it does not get
21 into lungs, which goes to all their smokeless tobacco
22 products and it is a product that seems to deliver a
23 better "kick," again, the knowledge of addiction.
24 THE COATS: Judge, again, it is objected to,
25 it is a portion-pack product that is in design. It



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1 was never used by Sean Marsee or never utilized by
2 him. It simply has no relevance. The strategy,
3 which later became Skoal Bandits.
4 MR. FINNEGAN: If the Court please, the
5 Skoal Bandits completely as opposed to cigarettes. I
6 don't think there is any dispute about that.
7 MR. BRALY: Judge, this shows the state of
8 mind of the company. They were just out absolutely
9 to take advantage of the health implications of
10 smoking.
11 THE COURT: I think it would be relevant on
12 that issue.
13 MR. BRALY: 323?
14 THE CLERK: Admitted?
15 THE COURT: Yes.
16 MR. COATS: Again, in regard to a product
17 that he never used, though, that product note our
18 objection to that.
19 THE COURT: They are saying that project is
20 healthier because it does not get into the lungs.
21 MR. COATS: All they are reading is the
22 result of the study. It it not like they are
23 recommending, all they are doing is reporting the
24 results of the study that was there, not that the
25 they are saying that it is so, they are saying what



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1 the study shows, and it is a study about a product
2 that they never used and it is terribly prejudicial
3 and if it shows the company's mental attitude, it
4 does it about a product that he was never involved
5 in.
6 MR. FINNEGAN: It was perceived, Your
7 Honor.
8 THE COURT: They are being advised in 1981
9 that persons think that their product is safer
10 because it does not get into the lungs and obviously,
11 that was the content of some of their advertising,
12 suggesting that it is -- they can be perceived.
13 MR. COATS: Not on any product he ever used,
14 the advertising of that product was pouch instead of
15 a puff, which was not the product he used.
16 MR. BRALY: The Court needs to understand
17 something, this is kind of a red herring, because
18 they had a portion pack on the market.
19 THE COURT: I have admitted it, so let's go
20 on.
21 MS. DESCHAMPS-BRALY: The next one, Your
22 Honor, is 324. And the main relevance in this comes
23 with Page 6, Paragraph -- are we on the same
24 document? 324, at Page 6.
25 THE COURT: I believe that's --



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1 MS. DESCHAMPS-BRALY: The one I have is 324
2 is moist smokeless.
3 THE COURT: That's it.
4 MS. DESCHAMPS-BRALY: Okay. Under C right
5 here where it says "The health issue continues to be
6 a major concern for all marketers in the tobacco
7 industry."
8 The second short paragraph "We feel that
9 during the next three years the primary emphasis will
10 remain on cigarettes, however, as we grow to be more
11 visible, this issue will come into focus."
12 That shows that they were aware of it, Your
13 Honor, and they were going to do everything that they
14 could to not do anything about it until they
15 absolutely had to take advantage of the period of
16 time that they were going to have until the
17 visibility forced them to face it like they are being
18 forced to face it now. They knew that there was a
19 health issue and they didn't do anything to warn the
20 public about it.
21 THE COURT: When was this?
22 MR. COATS: Information compiled in 1984
23 again.
24 MS. DESCHAMPS-BRALY: There are tables in
25 here from 1977 through --



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MR. BRALY: Wait a minute, Your Honor, this was not a document that was produced in 1984. This was a plan made in 1982 reflecting their long-range strategy for 1982, 1983 and 1984.

MR. COATS: I can't see the document, I can't be sure. It has data --

THE COURT: It looks like it was a 1982 project.

MR. COATS: That may be right.

THE COURT: I will admit 324.

What is next?

MR. FINNEGAN: What is that one?

MR. COATS: Skoal Bandits.

THE COURT: What is the relevance of this and when was it --

MR. BRALY: Well, the document is undated.

MR. FINNEGAN: If it is Skoal Bandits it has to be a relevant to the '83-84 period, at least the fall of '83.

MR. COATS: That is when the product was marketed, Judge.

THE COURT: Is there anything in there that we haven't gotten in a half dozen times before. A lot of this is getting repetitious.

MR. BRALY: Just a second. Probably the



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1 attachment to the document at the end is the most
2 important thing, Your Honor.
3 THE COURT: What is the number of this?
4 MR. BRALY: It is 325. You need to read the
5 preamble at the beginning of the article.
6 THE COURT: That is the next exhibit, I
7 think.
8 MR. COATS: That is the next exhibit. It is
9 separately.
10 MR. BRALY: Numbered separately?
11 I am not concerned about the document; I was
12 concerned about what I perceive as being the
13 attachment to the document.
14 THE COURT: All right. I will sustain the
15 objection to 325 and let's look at the next document,
16 which you say is the attachment.
17 MR. BRALY: It is 326, it is not -- it is
18 the next document. It just got on here twice.
19 THE COURT: November of '83. Do you object
20 to 383?
21 MR. COATS: Yes, we do. It is after the
22 time.
23 THE COURT: What is the relevance of 383 --
24 Excuse me, 326.
25 MR. BRALY: It was a November '83 document,


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Your Honor. It just shows the company's knowledge that selling on a health basis is -- is a good marketing strategy is all it is.

THE COURT: I will sustain the objection to 326.

MR. COATS: 1984, Your Honor (indicating).

THE COURT: Is this fellow a football player.

MR. COATS: Yes. His son was the one that got his neck broken real bad in a terrible football accident.

MR. BRALY: Which one are you talking about?

MR. COATS: Nick Buoniconti.

THE COURT: What is it, 327?

MR. BRALY: Yes. It just shows their objectives with their selections, Your Honor.

THE COURT: I will sustain the objection. That is 1984.

MR. BRALY: Well, these people have been with them for a long time.

THE COURT: I know.

MR. COATS: That's Skoal Bandits, there is an objection to it Your Honor, as it was Skoal Bandits that was entered at the time after the time Sean Marsee quit using tobacco at all. There is no



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1 indication that that in any way impacted Sean
2 Marsee.
3 MR. FINNEGAN: Or that he ever used it.
4 MR. COATS: Or he didn't use it. Even the
5 strategy --
6 MR. BRALY: Look at the last page of the
7 document, Your Honor. Integrated Strategies. This
8 is what I am -- this is a short document, it is five
9 pages, four pages.
10 THE COURT: Integrated objectives.
11 MR. BRALY: This is what we have been
12 talking about the company has integrated objectives
13 for all of its products. Look at the thing, to
14 exploit the health advantages.
15 MR. FINNEGAN: What is the date of the
16 document?
17 MR. BRALY: June 15th, 1983.
18 MR. COATS: It was a plan again to operate
19 sometime in a future over a product that Sean never
20 used.
21 MR. BRALY: On the other hand, one could
22 look at it and the jury could properly infer that
23 they were continuing a plan to exploit the health
24 advantages that they had been implementing since
25 1968. This was a year-and-a-half before this lawsuit



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1 was filed, Your Honor.

2 THE COURT: Don't we have numerous exhibits

3 saying similar things --

4 MR. FINNEGAN: We do, Your Honor.

5 THE COURT: -- without causing problems with

6 another document that is --

7 MR. BRALY: We do not have, so far as I

8 know, a single other document that says explicitly we

9 are going to exploit the health advantages. You

10 know, if you ask the witness did the company intend

11 to exploit the health advantages, he's going to say

12 yes, there is a document in here that says that.

13 THE COURT: I would tend to think that that

14 would show their belief that there is a health

15 advantage, even though it is a June, 1983 -- they

16 certainly hadn't discovered something in June '83

17 that they hadn't believed for sometime.

18 MR. COATS: Except it had to do with the

19 product, it is Skoal Bandits, it completely --

20 MR. FINNEGAN: What they said --

21 THE COURT: The three of you talk at one

22 time.

23 MR. COATS: That's right, I'm sorry.

24 MR. FINNEGAN: They are saying there that

25 they are going to do something. I am not sure



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1 whether they did it or they didn't do it, but this it
2 talking about something that they are going to do in
3 the future after the time that Sean had stopped using
4 snuff.
5 THE COURT: Is that the only thing out of
6 the document that is relevant?
7 MR. BRALY: As far as I am concerned, that
8 is the only thing that is particularly pertinent.
9 THE COURT: I will admit Page 209, the first
10 page. You know what I am talking about?
11 MR. BRALY: 2091477.
12 THE COURT: Really, that shouldn't be
13 harmful to the defendant, anyway, if there are health
14 advantages.
15 Okay. What is next?
16 MR. BRALY: Excuse me, I am going to have to
17 ask the witness about this one. Judge, on the
18 document, Exhibit 329, what was significant to the
19 witness was --
20 THE COURT: I am not sure which 329 is.
21 MR. FINNEGAN: Is that the next document?
22 MR. COATS: They are not tabbed right, so it
23 is hard to --
24 THE COURT: Yes.
25 MR. BRALY: There is not a tab on every one


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1 of them, Judge. That one you have already ruled on.
2 THE COURT: Is it the moist snuff consumer
3 profile study?
4 MR. BRALY: (Indicating).
5 THE COURT: That's 329.
6 MR. BRALY: Yes. Now, the front page, I
7 don't know what all he's got on there, but it talks
8 about the momentum on Skoal from July through October
9 of '83. The significant thing is in the attached
10 document, it shows over here that the brand name
11 Skoal became the second most recognized tobacco brand
12 name in the country by virtue of the success of their
13 advertising activities over a number of years.
14 THE COURT: Does it say that?
15 MR. BRALY: (Indicating). Well, --
16 MR. COATS: It was made in May of 1984,
17 Judge, what it was that particular time.
18 THE COURT: I will sustain the objection to
19 that.
20 MR. BRALY: Well, okay. Can he testify that
21 this is the sort of thing that he would base his
22 opinion on, that this is the kind of market research
23 that he would base his opinion on? Clearly they
24 didn't give the one year's time.
25 MR. COATS: Not the time frame.



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1 THE COURT: We are talking about Skoal
2 Bandits.
3 MR. FINNEGAN: No this is Skoal.
4 MR. BRALY: This is Skoal, the product named
5 Skoal.
6 THE COURT: I think that is getting -- it is
7 after his death, and it is a product that he didn't
8 use. I think that is too far off. You agree with
9 that, I can tell.
10 MR. BRALY: Your Honor, for the record, I
11 want to say what this young boy used was oral
12 tobacco. He didn't use anything else but oral
13 tobacco. And that's the product that he used. It
14 has got a generic name, and most of it is made by
15 this one company. As a matter of fact, this company
16 invented the generic name smokeless tobacco for their
17 products.
18 THE COURT: What's next?
19 MR. BRALY: This one we have already been
20 through.
21 MR. FINNEGAN: Yes, the Court sustained our
22 objection on that.
23 MR. BRALY: Yes, the Court sustained that
24 earlier.
25 MR. COATS: The Court worked on that



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1 earlier. It is what is back in here that he was
2 talking about, Skoal Long Cut and other products that
3 weren't used.
4 MR. FINNEGAN: Skoal Long Cut came on the
5 market after Sean's death.
6 THE COURT: What is the number of that, have
7 you got a number?
8 MR. BRALY: It is Exhibit 330.
9 THE COURT: 330, sustained. Okay. 331.
10 MS. DESCHAMPS-BRALY: Your Honor, this is an
11 article from what the witness will testify is a
12 reputable journal in their profession and he would
13 rely on what you can see from the marking it talks
14 about the great success of using spokespersons, et
15 cetera, et cetera.
16 MR. FINNEGAN: What is the date?
17 MR. BRALY: It says January, 1983.
18 THE COURT: How would you use that?
19 MS. DESCHAMPS-BRALY: Well, I would imagine
20 he says he relies on what they are saying in here,
21 his discussion that it is similar to the opinion that
22 he's basing it on and that it helps him to
23 substantiate the opinion that he has arrived at as to
24 certain items, examples what hit me right at the
25 beginning is it demonstrates the power of prominent


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celebrity spokespersons in the right environment. Right in here (indicating).

THE COURT: Have you got any objection to this?

MR. FINNEGAN: Object to its admission.

MR. COATS: I think there is something in there just like it, I don't think it needs --

THE COURT: I don't want to get in the record, just 331 he can testify about. I will sustain the objection, but --

THE COURT: Anything new about the sales promotion plan for '84?

MR. BRALY: No, except that you will see it starts for September, '83, through 1984 on a number of documents, Your Honor. Again, it's background information that this man has used to show the kinds of things that they can do and have been doing.

MR. COATS: That's one of the problems.

MR. FINNEGAN: That's really the problem, it is the background of that kind of document.

THE COURT: I will sustain the objection to that. Is that 332?

THE CLERK: Yes.

THE COURT: What about the next one, is that 333, the next one?


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1 MR. BRALY: Yes. Those appear to have
2 underlinings. I would have to look and see. Which
3 document are you looking at, Your Honor? The
4 proposal -- I am missing one.
5 Judge, I'm sorry, I can't, I don't have
6 that document in my file. Let me take and see what
7 he's got.
8 (Handed to counsel).
9 It just shows the company's intention to
10 increase their sales by sampling, one-on-one
11 sampling.
12 THE COURT: I will sustain the objection to
13 that.
14 MR. BRALY: We didn't have a number for it,
15 it was missing from our exhibit stack. It was an
16 unnumbered document, since he is not going to admit
17 it --
18 MR. COATS: Why don't you just withdraw it.
19 MR. BRALY: We will just withdraw it. Okay.
20 THE CLERK: Still got to have a number.
21 MR. COATS: Got to have a new number, 1,012,
22 have we got one like that.
23 MR. BRALY: Young lady, have you got any
24 suggestions?
25 THE COURT: What is the problem?



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1 THE CLERK: We just need a new number, the
2 next number was 333, they have actually got a 333.
3 MS. DESCHAMPS-BRALY: How about an XXX.
4 THE CLERK: No.
5 THE COURT: This is 333, that is what you
6 just marked as 333; is that right?
7 THE CLERK: The one you just ruled on we
8 marked as 333 and it really isn't.
9 MS. DESCHAMPS-BRALY: How about 332-A?
10 THE COURT: That will be all right.
11 MR. BRALY: The next document is 333. Any
12 objection to that?
13 MR. COATS: No.
14 THE COURT: Before the jury should see any
15 of those documents, make sure that "confidential" is
16 excised.
17 MS. DESCHAMPS-BRALY: We are going to lunch
18 now, too.
19 THE COURT: That's fine, we will recess
20 until 1:30. Court will be in recess.
21 (The noon recess was here had.)
22 AFTERNOON SESSION
23 Friday, June 6, 1986
24 THE COURT: There was at least one document
25 which I did not rule on which is the Lotus Project.



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1 MR. BRALY: Yes.

2 THE COURT: I take it this witness, you want

3 that witness to --

4 MR. BRALY: Yes.

5 THE COURT: -- consider that. Is that

6 Plaintiff's Exhibit 320?

7 MR. BRALY: I think the document as a whole

8 is. Unfortunately it may be marked as two different

9 exhibits in the record. It was previously used in

10 Bantle's deposition. I think the number that you

11 have got for it today is 320.

12 THE COURT: No, it is Plaintiff's Exhibit

13 158 and 199.

14 MR. BRALY: Yes.

15 THE COURT: The Lotus Project. I have read

16 and reread those documents over the lunch break,

17 gentlemen, and it is apparent from reading I believe

18 it would be the second of those two documents that

19 there was -- this is the way I interpret this

20 document -- that there was a conference between the

21 Swedish Tobacco Company and the United States Tobacco

22 Company, and subsequent to that conference there was

23 a letter from Mr. -- another conference where Mr.

24 Bantle, who was the president of United States

25 Tobacco Company, expressed his desire to have a Lotus



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1 Project, and as part of that Lotus Project, attached
2 to it is a description of the Lotus Project, which
3 says the target group is new users, age group 15 to
4 35. There is no particular indication that that has
5 been implemented; however, it would not be
6 inconsistent with the advertising on other products
7 subsequent to that time. It may well be explainable,
8 but I think it is relevant.
9 MR. COATS: Your Honor, let me just suggest
10 what he said was the "Lotus product." He didn't say
11 "project." The word was "product."
12 MR. FINNEGAN: That's a big distinction,
13 Your Honor.
14 THE COURT: It has attached to it the Lotus
15 Project?
16 MR. COATS: Right. The Swedish had the
17 Lotus Project. What we told them to do is build the
18 Lotus product.
19 THE COURT: I think it is explainable, and I
20 will overrule the objection.
21 MR. BRALY: Thank you very much, Your Honor.
22 If I can take care of one quick formality, Your
23 Honor.
24 THE COURT: So 158 and 159 will be admitted.
25 Now, there was one other document that had



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1 to do with some legislative efforts. What I want you
2 to do now is just withdraw that for the time being,
3 unless you want to spend the rest of the afternoon
4 discussing that.
5 MR. BRALY: No, sir.
6 THE COURT: All right. You can bring it up
7 at a later time, but with this witness, just exclude
8 that. Is that satisfactory?
9 MR. BRALY: Yes, Your Honor. I will be more
10 than happy to accommodate the Court on that.
11 THE COURT: Anything else?
12 MR. BRALY: Just a real quick formality,
13 Your Honor. For the slides that Doctor Hunter had
14 yesterday, I propose to substitute two prints.
15 THE COURT: That's fine.
16 MR. BRALY: And I am showing counsel.
17 MR. JENNINGS: No objection.
18 MR. COATS: Are the other documents purged
19 from his file? Does he still have the same ones?
20 MR. BRALY: Andy, I have gone through at
21 lunch at some considerable length and without lunch,
22 and every document that is out I have drawn a line
23 through, stricken it, put the exhibit number, put a
24 notation that the document is out. The witness has
25 gone through and purged his cards. I don't think



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1 there will be any inadvertent references to them. I
2 don't want to jerk them out of there because I want
3 to leave them as a group.
4 THE COURT: Yes, bring in the jury.
5 (The following proceedings were had IN THE
6 PRESENCE AND HEARING OF THE JURY.)
7 THE COURT: Go ahead, Mrs. Braly.
8 Q. (BY MS. DESCHAMPS-BRALY) Doctor Cagley,
9 let's try and start where we were right before lunch.
10 What was U.S. Tobacco Company's strategy and approach
11 to marketing objectives?
12 A. That what we were talking about earlier in
13 terms of expanding market share and --
14 Q. Right.
15 A. -- protecting their current share I think
16 are very relevant. From the documents that I have
17 gone through, there were some specific items that
18 they said this is what we intend to do, and I -- and
19 I would like to read a quote, if I can. I hate
20 reading quotes, but it is the only way that I can try
21 to sort out this bunch of documents that I saw.
22 Q. As long as you are reading from something
23 that has been marked as admitted, you are fine.
24 A. Yes, I am.
25 THE COURT: When you are going to talk from


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1 an exhibit, identify which exhibit it is --
2 THE WITNESS: Okay.
3 THE COURT: -- by number.
4 THE WITNESS: I shall. You can get a little
5 handle of their strategy from the exhibit entitled
6 "Minutes Snuff and Chewing Tobacco
7 Research-Manufacturing-Marketing Meeting, New York
8 Hilton," dated 1-22 through 23rd, 1968. And let me
9 see, that's Exhibit 157.
10 Mr. Bantle was quoted at that point in
11 time -- Mr. Bantle is vice-president of marketing.
12 He said, "...Now is the most opportune time to
13 convert people to using moist brands. We must sell
14 the use of tobacco in the mouth and appeal to young
15 people. This year our ads will be in line with the
16 convenience of using snuff and/or chewing tobacco and
17 we hope to start a fad. The theme will be 'Tobacco
18 Too Good to Smoke.'"
19 That was one indication, I think, of their
20 intentions back in 1968.
21 Another document to a related issue which
22 relates to something called the Lotus Project, and
23 again let me read a quote.
24 Q. Would you please identify the document for
25 us.



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1 A. It is Exhibit 199. "Mr. Bantle further
2 declared that he wanted a Lotus product for the U.S.
3 market..." It "should not be a Copenhagen or
4 Skoal."
5 A little bit later in the document what that
6 implies is a target group of new users, mainly
7 cigarette smokers, age 15 to 35.
8 Q. Doctor Cagley, do you have a blowup of that
9 particular document?
10 A. Yes, I think there is. Yes, this is the
11 blowup of the document that I just read to you from
12 before. The annual Lotus Project or product was to
13 make it easier for a new user to use tobacco in the
14 mouth.
15 THE COURT: Doctor, excuse me for
16 interrupting you.
17 THE WITNESS: Yes.
18 THE COURT: Will you turn it a little bit so
19 the jury can see it.
20 THE WITNESS: Yes. The target group: "New
21 users, mainly cigarette smokers, age Group 15 to
22 35." A description of the product. Under nicotine
23 satisfaction, feeling in the mouth, taste, and also
24 the size of the pack.
25 Q. Doctor Cagley, what is a target group?



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A. There is a concept in marketing called market segmentation. The concept of a target group comes from that, and it's a way of doing a couple of things. One is to divide up a market into groups of people that will respond to something. A market program, a promotional program. The second part of that is a development of marketing programs designed specifically towards that group of people. It is relaly a twin kind of concept.

Q. From the general research that you have done of documents that you have in front of you, is it your opinion that the company was aware that persons under 18 were using their product?

A. Yes.

Q. Is it your opinion that it was the intention of the company to market their products to people under the age of 18?

A. Yes.

Q. Doctor Cagley, from the documents you have reviewed and your experience, did the consumers have certain perceptions about different brands of U.S. Tobacco snuff products?

A. Yes, they did. And let me answer that a couple of ways. One is specifically related to who uses our particular products, and that's a way in



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1 marketing research to get a picture of a product, and
2 imagine, a position, if you will.
3 And, yes, here are again some quotes, and
4 this is from a document entitled "The Qualitative
5 Consumer Exploration of Moist Smokeless Tobacco
6 Advertising in Brand Perceptions," Exhibit 309.
7 Q. Thank you.
8 A. Happy Days. A victim of poor image. It is
9 not a serious product. "Candy-assed... Only for
10 beginners... It doesn't look too manly".
11 "Skoal was viewed as being for 'young
12 men...High school boys...A brand dippers probably
13 start with.' Copenhagen was thought for 'older
14 guys...More experienced users.'"
15 Skoal also beginner's brand, because that is
16 what young fellows use. Copenhagen is universally
17 regarded as the end of the line for experienced
18 dippers.
19 Different brand perceptions for different
20 products. Who uses them by the individual brands
21 within the product, the products that they sell.
22 Let me read you one more quote, and this is
23 from a document, Exhibit 333. It is a memo from Mr.
24 Lindqvist, the senior vice-president of marketing, to
25 Mr. B. J. Nova, who was executive vice-president



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Tobacco Division and president of the Tobacco Division.

"...It is widely believed within the company that Copenhagen has an image as the strongest and most macho product within the category. We suggest that" -- he used the word "Carl." The document is talking about Cale Yarbrough, however. "Cale's message should be consistent with this image, Copenhagen is top of the line in strength and taste."

Those kind of quotes, those kind of documents say, yes, the perception in the marketplace is that people perceive different kinds of people will chew different brands of moist tobacco.

Q. And, Doctor Cagley, I am not sure whether you have answered the question that I asked you previously. When you were talking about the company's strategy in their approach to marketing objectives, how did the company go about implementing the strategy in this approach to marketing that the executives developed?

A. Two principal ways that I saw. One is through the development and execution of advertising programs. The other one is through the development and execution of sales promotional programs.



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1 Q. My next question is did these things have an
2 effect; that is, what I am asking you is did it work?
3 A. Yes, I believe it -- I really believe they
4 did. I'm sorry.
5 Q. Is one-on-one sampling an effective
6 technique?
7 A. Yes.
8 Q. Are other types of promotional activities
9 effective?
10 A. Yes. When you talk about sales promotion
11 activities, sampling is an example -- the
12 distribution of trial packages, the distribution of
13 trial sizes -- and we see a lot of those. I'm sure
14 you have had some delivered to your home in your
15 mailbox, and it is an effort to induce trial, to let
16 you try a little bit of the product without making a
17 major commitment in terms of money or time. Those
18 kinds of things tend to be very effective in
19 generating the trial.
20 Other kinds of activities are sponsorship of
21 things and participation in events. The ones that I
22 have seen in these documents that I have gone through
23 are car races, some of the sales promotion. Car
24 races, I saw a tape that had to do with -- I gather
25 the term promotional tent that was set up at Padre



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1 Island.

2 MR. COATS: If the Court please, may we

3 approach the bench?

4 (The following proceedings were had AT THE SIDE

5 BAR.)

6 MR. COATS: First, Your Honor, the Padre

7 Island, we ask that it not be involved in talking

8 about that. Secondly, apparently they are going to

9 offer some evidence, some Skoal Bandit of race cars.

10 That is well beyond the time when the product is not

11 involved, and there are some other implicated

12 factors, but we need to take that issue up at this

13 time.

14 THE COURT: What do you say?

15 MR. BRALY: I will tell the man to keep his

16 mouth closed. He did rely on a statement made at

17 Padre Island from consumers --

18 MS. DESCHAMPS-BRALY: You have excluded him

19 from evidence. That means he can't testify that he

20 relied on it?

21 MR. BRALY: The other thing is two model

22 cars.

23 THE COURT: What is the relevance of the

24 model cars?

25 MS. DESCHAMPS-BRALY: The relevance of the



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1 model cars is that it is an indirect way of promoting
2 their product. It is a -- it is not listed as a
3 model car to be built. The gist of the packaging as
4 Your Honor will see --
5 THE COURT: Isn't this a product that came
6 back after he got the disease?
7 MR. FINNEGAN: They weren't marketing it
8 until 1984.
9 MR. BRALY: Judge, irrespective of that, --
10 MR. FINNEGAN: Excuse me. One of the things
11 I understand, they were manufactured by some toy
12 manufacturer, not by the United States Tobacco
13 Company, No. 1. No. 2, as far as we can tell, they
14 weren't on the market by that company until 1984,
15 maybe 1985.
16 MS. DESCHAMPS-BRALY: Your Honor, that's
17 fine if they want to put on evidence that that's when
18 they were marketed. There is no way to --
19 THE COURT: If you can put on evidence it
20 was marketed prior to his getting the disease, I will
21 let it in.
22 MR. BRALY: There is another way for it to
23 come in. We asked the chairman of the board in his
24 deposition if the company would ever allow their
25 trademarks to be used without their permission. The



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1 company said "no." The chairman of the board said
2 "no." We asked him if they had ever marketed to
3 young people. He swore under oath that they hadn't.
4 I confronted him with these two cars and, you know,
5 obviously they had. We impeached the witness with
6 that physical evidence.
7 THE COURT: I will sustain the objection.
8 MR. FINNEGAN: Thank you, Your Honor.
9 MR. BRALY: Note our offer of proof.
10 (The following proceedings were had IN OPEN
11 COURT.)
12 Q. (BY MS. DESCHAMPS-BRALY) Doctor Cagley, was
13 United States Tobacco Company in your opinion aware
14 of the health issue?
15 THE COURT: Just one moment. I need to make
16 something clear. I am sorry to interrupt you, but I
17 have ruled certain evidence in regard to Padre Island
18 as not relevant, so don't go into it in that regard.
19 THE WITNESS: Fair enough.
20 THE COURT: Go ahead.
21 Q. (BY MS. DESCHAMPS-BRALY) Let's go on to
22 another area now.
23 A. Okay.
24 Q. In your opinion was the United States
25 Tobacco Company aware of the health issue?



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1 A. Yes.
2 Q. And why do you think so?
3 A. Again, from the documents that I have gone
4 through, the first evidence in the papers that I see
5 or the memo dated or minutes of a meeting that was
6 dated in 1968, and again pardon me for reading, but I
7 will. "Doctor Bennett asked if we should pursue
8 health research on these brands before we are put on
9 the spot without the answers. We should conduct
10 animal studies on the health aspect of snuff. This
11 is to be a private investigation and strictly
12 confidential."
13 A somewhat later date, this is from a
14 document entitled "Moist Smokeless Three-Year
15 Long-Range Plan, 1982 to 1984."
16 Q. Do you have the exhibit number on that one?
17 A. Exhibit No. 324. Quote again, "The health
18 issue continues to be a major concern for all
19 marketers within the tobacco industry. We feel that
20 during the next three years the primary emphasis will
21 remain on cigarettes. However, as we grow and become
22 more viable, this issue will come into focus. We
23 will keep a close eye on the developments in this
24 area."
25 Q. Doctor Cagley, we know now that they were


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1 aware of the health issue, but can you tell me were
2 they aware of how the public perceived their product
3 insofar as whether it was safe or not?
4 A. Yes. One of the documents in here, again,
5 the Exhibit 323, entitled "Highlights of U.S.
6 Research Project on Smokeless Tobacco Portion
7 Pak-November 6th, 1981." Again a quote. "It is
8 perceived as a healthier product form than are other
9 tobacco products in that it does not get into the
10 lungs...."
11 "Beginning users should also be instructed
12 in the finer art of usage." It is "the intelligent
13 tobacco...."
14 Q. Doctor Cagley, based on your knowledge of
15 the health issue, can you tell us in your opinion
16 what United States Tobacco Company did so far as
17 marketing their product is concerned?
18 A. As far as marketing the product, what I
19 appeared to see in the marketplace, I don't think
20 they made any changes whatsoever, with a couple of
21 exceptions. There was a youth prohibition put in
22 some of their print advertising around 1978, I
23 believe, which says, "Offer not available to minors."
24 Q. And let me ask you this.
25 A. Yes.


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1 Q. Insofar as the manner in which they
2 advertised, in your expert opinion were there any
3 implications in their marketing that their product
4 was a safe alternative to cigarettes?
5 A. Yes. Again, back to the printed ads, I see
6 things like "I love tobacco. I don't smoke."
7 Can I pick up this thing?
8 MS. DESCHAMPS-BRALY: Excuse me a moment.
9 If I may approach the witness, there are some charts
10 up there that --
11 THE COURT: Yes.
12 THE WITNESS: This is a presentation of some
13 print advertising that was run in both Sports
14 Illustrated and Field & Stream, and it covers a
15 number of years. Let me go through some of these
16 with you.
17 This one, the headline, "Copenhagen tobacco
18 isn't for smoking. It isn't lit, puffed or inhaled.
19 It is too good to smoke." Down here the smokeless
20 tobacco, they aren't "lit, puffed or inhaled. They
21 are too good to smoke. Enjoy rich tobacco flavor
22 without the smoke."
23 Okay. The implication of this is that, yes,
24 you probably know there is some hazards, health
25 hazards from smoking cigarettes. The implication


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1 from this is as far as people would be reading this
2 is that it is safer.
3 "Introducing an old way to enjoy tobacco."
4 "I love tobacco. I don't smoke." "I love tobacco.
5 I don't smoke." "We love tobacco. We don't smoke."
6 Okay. This is Shep Messing and Carlton
7 Fisk. The implication from these, I think, at least
8 in people's heads are that looking at these things is
9 that this is a safe -- this is a safe alternative
10 form instead of lighting up and smoking a cigarette.
11 Q. If you are finished with those, you can sit
12 down.
13 A. I am not quite finished.
14 Q. Oh, I'm sorry. Go right ahead.
15 A. I mentioned the youth prohibition. It
16 appears for the first time here. This was the 5
17 September Sports Illustrated 1977. "Offer not --
18 something "to minors."
19 On Sports Illustrated. "Offer not available
20 to minors." "Offer not available to minors. Limited
21 to one sampling per year." So a youth prohibition
22 appears there.
23 THE COURT: Sir, could you speak up. They
24 are probably having trouble hearing you, and you know
25 the court reporter is.


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1 THE WITNESS: As I went through these ads
2 going through a large stack, I was going through very
3 critically from the point of view what were they
4 trying to say, what were they trying to communicate,
5 what did they do, and I started reading them, and I
6 noticed -- I made a note to myself that the youth
7 prohibitions started appearing in late '78. And it
8 didn't, it appeared in 1977. I missed it completely,
9 and I was being extremely critical going through
10 these ads, looking for words, looking for phrases,
11 and it just went by me.
12 Q. (BY MS. DESCHAMPS-BRALY) Doctor Cagley,
13 from a marketing standpoint, given U.S. Tobacco's
14 knowledge of the health issue that was out there,
15 what could they have done?
16 A. Could they have done? There are some
17 positive things that one can do, if one realizes that
18 I think it is in the long-run best interest of the
19 company. The obvious one is warning labels on the
20 package. The consumer education kind of thing.
21 Another alternative that would be effective
22 would perhaps be voluntary point of sale display
23 restraints. You don't have them on the counter. You
24 make people ask for them. Sales force kind of
25 activities in terms of trying to -- try to



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1 communicate with individual store owners that perhaps
2 you should restrict the sale to those people who are
3 18 and above, who are adults, and the product is
4 probably not safe for younger people. I see nothing
5 that would have affected, I don't think, the sale of
6 their product. I think those would have been very
7 positive steps aimed at informing the consumer,
8 consumer education kind of issues.
9 I think those are very important. For
10 example, before I drove over this morning, I grabbed
11 the Bayer Aspirin out of the medicine cabinet and put
12 it in my briefcase. There is a warning label on it.
13 It says, "Consult a physician before giving this
14 medicine to children, including teenagers with
15 chicken pox or flu." That's a voluntarily positive
16 way of going, saying that perhaps this product in
17 use, if you are not careful, has some problems.
18 In the long run that's a very positive
19 benefit, I think, for the people that produce Bayer
20 Aspirin.
21 Q. Now, Doctor Cagley, I realize that you are
22 not in any way a health-care specialist, and I am
23 talking about from a marketing standpoint. From a
24 marketing standpoint, if these people knew that there
25 was going to be a health issue, should they have put



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1 a warning label on that product?
2 A. In my opinion, yes.
3 Q. My last question has to do with a film that
4 I believe you have seen that was shown to the jury
5 yesterday which was an instructional film to high
6 school students on how to drive safely.
7 A. Yes.
8 Q. Did you see that film?
9 A. Yes.
10 Q. Can you tell me what kind of impact that
11 particular film would have on high school students
12 who were watching it?
13 A. Okay. Obviously that film was designed for
14 high school people who were going through driver's
15 education. What I would take out of that is that the
16 reception that I think people would take from it is
17 that it is a safe product. I mean they were talking
18 about driver education. We are talking about trying
19 to teach you how to drive safely. We wouldn't be
20 talking about a product that is dangerous to you. So
21 the indication, I think, is a feasible one to make
22 that safety in cars is the same thing as safety in
23 moist tobacco.
24 Q. Thank you, Doctor.
25 MS. DESCHAMPS-BRALY: I have no further



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1 questions.

2 THE COURT: Cross-examine.

3 CROSS EXAMINATION

4 BY MR. COATS:

5 Q. Doctor Cagley, you have some notes there in

6 front of you that --

7 A. Yes.

8 Q. -- you turned through that you have gone

9 through there. What are those notes?

10 A. These notes right here, Mr. Coats?

11 Q. Yes, sir, please.

12 A. These are notes of internal United States

13 Tobacco Company documents.

14 Q. No, the one you have been referring to.

15 A. Oh, these. These are note cards that I made

16 out of these documents.

17 Q. . Did you have on there the answer to her

18 questions? Is that what that is?

19 A. Yes and no. They are the way I prepare for

20 the case in terms of anticipation of questions.

21 Q. Well, that is what I want to get to. Do you

22 have the questions on there or just the answers?

23 A. I don't have any questions on here, no. I

24 have titles. For example, this one has the title on

25 it "Advertising Effects."



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1 Q. Do you have on there the answers to
2 questions that I am going to ask you?
3 A. I don't know.
4 Q. Do you have on there the questions I am
5 going to ask you?
6 A. No.
7 Q. I'm sorry. Because I would like to see
8 them, if you did, because I would like to know.
9 Doctor Cagley, you had indicated you had
10 done some research at some part of your life with
11 advertising and marketing on children's preferences.
12 A. Yes, children's preferences as related to
13 specific types of print ads, not product preferences.
14 Q. That's right. You didn't do any work for
15 television and showed --
16 A. No.
17 Q. -- what you did? You showed printed
18 advertising like those?
19 A. Very similar.
20 Q. Just tell the jury how you did that.
21 A. The mechanics of the study?
22 Q. Yes, sir.
23 A. The mechanics of the study. I was
24 interested in getting children's reaction, children
25 who were five years old, children who were eight



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1 years old and children who were eleven years old, and
2 their reaction to what they might see in an
3 advertisement. In particular, their reaction to, I
4 guess, a social situation.
5 And let me explain what I mean by that.
6 There is a lot of different ways that you can present
7 advertising. One of them has to do with the
8 illustration. I was interested to try to find out if
9 those interests would change across that age
10 category. For example, would the younger children be
11 more comfortable and more -- and prefer an ad that
12 had an illustration of a family setting where a
13 parent and the child would be present. Would they be
14 more likely -- would they prefer a setting where
15 there would be a sibling, a brother or sister of the
16 same sex, or would they be more comfortable in a
17 setting where an individual would be pictured, and
18 what I was trying to find out was the change over
19 those periods of time.
20 There was an effort on my part to see here
21 is some guidance that advertisers can use for the
22 kinds of print advertising that they do. The
23 specific mechanics of it, do you want me to give you
24 that, Mr. Coats?
25 Q. Just generally. What do you do with the



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1 children when you show them ads and showed some and
2 not others?
3 A. Yes, the 5-year-olds were shown the ads that
4 were designed specifically for 5-year-olds in terms
5 of the art work, 8-year-olds for 8, 11 for 11. They
6 were shown it in -- the sample was drawn from an
7 elementary school setting in Minneapolis. They were
8 interviewed individually about these things.
9 Q. What was your conclusion from that study?
10 A. Conclusions from that study was basically
11 that, yes, there was a difference in terms of
12 preference, and that the older children tend to, as a
13 generality, tend to prefer peer kinds of ads as
14 opposed to family type of ads.
15 Q. All right. You indicated, I think, in your
16 discussions that one of the factors that is involved
17 in these children and preferences were the family
18 background, what the experiences were in their
19 family, and at some point in time that weakens, I
20 presume.
21 A. Yes.
22 Q. But it is there as a factor in --
23 A. Yes.
24 Q. -- where they go?
25 A. Socialization agent.



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1 Q. Socialization agent. That's a good phrase.
2 Now, does that mean, Doctor, that those
3 children who grow up in a situation where the family
4 uses tobacco and smokes are most easily acceptable,
5 accessible to tobacco usage?
6 A. More accessible?
7 Q. Yes, or more apt to accept tobacco usage.
8 A. I don't know. I can't comment on that.
9 Q. All right. But traditionally, family
10 attitudes about things do have some effect at
11 least --
12 A. Yes.
13 Q. -- on children?
14 A. Yes.
15 Q. All right, sir. Now, did you -- so when you
16 talk about what television does, that was just really
17 based mostly upon what studies you read about the
18 impact of television on --
19 A. Correct.
20 Q. -- children and that sort of thing?
21 A. Yes.
22 Q. And did you, in looking at those, at these
23 various articles, I think I have one here, which you
24 maybe sent to me. I think you sent me the article
25 about TV advertising affecting children by John



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1 Rossett?

2 A. Yes.

3 Q. And do you remember in there that he said

4 that, in talking about the television and ad effect

5 on young people -- First of all, did you know Sean

6 Marsee?

7 A. No, I did not.

8 Q. Do you know the family?

9 A. No.

10 Q. Have you been to Ada, Oklahoma, where he --

11 A. No, never been to Ada.

12 Q. Have you been to Talihina, Oklahoma?

13 A. No.

14 Q. Have you done any testing with children in

15 and around that area, young people?

16 A. No.

17 Q. Did you make any independent determination

18 yourself as to how much television Sean watched?

19 A. No, I have not.

20 Q. Do you know anything about his television

21 watching habits?

22 A. No.

23 Q. You do know, I gather, you accept from these

24 articles that if a young person watches some

25 three-and-a-half hours a day that he is exposed to



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1 approximately 20,000 commercials a year for a massive
2 200,000 commercials in total from the time that he's
3 age 2 till age 12?
4 A. I don't recall the specific numbers, but,
5 yes, somewhere --
6 Q. Anyway, you accept those?
7 A. Yes.
8 Q. So they receive a mass of all kinds of
9 commercials from all kinds of activities?
10 A. Absolutely.
11 Q. The commercial intended for adults,
12 commercials intended for children, all kinds of
13 commercials?
14 A. If, indeed, they watch that much television,
15 yes.
16 Q. All right. And the ability of theirs to
17 understand commercials depends a lot upon how much
18 television they watch and how much commercials are
19 shown to them, doesn't it?
20 A. And also their maturation level.
21 Q. That's right. As they get older, the
22 commercials mean more to them.
23 A. Yes.
24 Q. That's what "maturation" means, maturity,
25 they become more mature, and you would expect that,



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1 wouldn't you?

2 A. Yes.

3 Q. In fact, the conclusions you reach in your

4 conclusions are conclusions that you would expect to

5 reach that they, indeed, do have some impact?

6 A. Yes.

7 Q. Doctor, can you tell us how much impact they

8 have?

9 A. I don't understand your question, Mr. Coats.

10 Q. Well, you say it has impact. Is there any

11 way you can quantify, tell us how much impact they

12 have on children?

13 A. Advertising in general?

14 Q. Yes, sir.

15 A. Okay. Are you asking what kinds of effects

16 does advertising have?

17 Q. Well, my understanding is that you were

18 attempting to see whether advertising affected

19 children.

20 A. Yes.

21 Q. And I asked you, I think, when I took your

22 deposition if you could tell me how much they

23 affected children.

24 A. The amount or the effect, if I were

25 measuring that kind of activity in a research



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1 project, would be related to the establishment of
2 what were the objectives for your advertising.
3 Q. All right. But for what you have done, you
4 have told me that you can't quantify it, you can't
5 tell how much it affects; isn't that so?
6 A. Depending upon what your objectives are, Mr.
7 Coats. You are asking in an awareness objective, if
8 you are talking of a remembering objective, if you
9 are talking of communication of a specific image,
10 communication of a specific item, I can measure that.
11 Q. Let me ask you then, if I didn't ask you --
12 You recall when we took your deposition --
13 A. Yes.
14 Q. -- three days before we went to trial in
15 this case?
16 A. Yes, the 15th of May.
17 Q. And you recall there that I asked you these
18 questions. I said, "And what you did with your
19 studies was to try to see how much that affected the
20 children?"
21 And you say, "Answer: No, not how much. I
22 can't quantify it."
23 A. If there was a particular preference for
24 those particular ads, yes. That was my measure in
25 that particular study was preference and liking. I


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1 measured over those three types of ads, two --
2 Q. You told us you couldn't tell us how much,
3 you couldn't quantify it.
4 A. I did the study in terms of mean values and
5 mean ranks.
6 Q. Well, but what you told me under oath before
7 was that you couldn't, didn't you?
8 A. I think the question under oath in the
9 deposition was -- Can I see that for a moment?
10 Q. Yes, I would like for you to.
11 (Handed to the witness).
12 Q. Start right here and over to here
13 (indicating). You might just read that to the jury,
14 if you would, please, sir.
15 A. Okay. "Question: And presumably that is to
16 some degree affected or they wouldn't be continuing
17 to do it year after year.
18 My answer: "Correct.
19 "And what you did with your studies was to
20 see how much that affected the children?
21 "No, not how much. I can't quantify it.
22 Okay."
23 Q. Now, weren't you telling me there that you
24 can't tell how much?
25 A. Can I read on?



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1 Q. Sure.

2 A. "In terms of what I did with my study and

3 dissertation and the three or four things that I had

4 been doing with it."

5 THE COURT: Slow down. He can't take it

6 down that fast.

7 THE WITNESS: Oh, I'm sorry. "And I tried

8 to find out if it was effective. 'Effective' has a

9 bunch of different meanings. I was looking at

10 preference. I was looking at liking for the ads.

11 That was the measure of effectiveness that I used.

12 Other authors have looked at recall, interest,

13 liking, attitude change."

14 Q. Right.

15 A. Again, different measures of effectiveness.

16 Q. But the only research you did was just one

17 project as far as children is concerned?

18 A. Children, yes.

19 Q. Would the amount of television that someone

20 watched have some impact on whether these television

21 ads that you talk about had some impact on them?

22 A. From what I read, yes, heavy viewers seem to

23 like advertisements more than lighter advertising

24 viewers.

25 Q. Again, this is not based on what you have



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1 done, what you have read?

2 A. Yes.

3 Q. Based on what you have read, obviously, the

4 more you watched, the more significant they are to

5 them. And did you know, Doctor, that Mrs. Marsee

6 testified -- we asked what about television, radio,

7 did he watch television a lot -- she answered, "Very

8 seldom."

9 A. No, I did not know that.

10 Q. Doctor, you had some big charts here when

11 you talked about --

12 MR. COATS: Excuse me, Your Honor, I want to

13 get these charts behind here, if I might cross the

14 obstacle course here.

15 Let's put this up a minute, if we can.

16 Q. (BY MR. COATS) Now, Doctor, we talked about

17 the three, I think you gave us, things that companies

18 try to do.

19 A. Yes.

20 Q. In advertising.

21 A. Marketing.

22 Q. Marketing?

23 A. It was marketing strategy, not advertising.

24 Q. Let's clear that up. What is the difference

25 between marketing and advertising?



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1 A. Advertising is specifically related to
2 promotional activities, advertising, sales promotion,
3 those kinds of activities. The objectives would tend
4 to be different, however. They would tend to feed
5 into these kinds of objectives. So marketing
6 activities and strategy are more general,
7 advertising --
8 Q. I think maybe you are the only human being
9 that talks faster than I do. If you can slow down
10 just a little bit.
11 A. The point I was trying to make is marketing
12 activities tend to be general. Advertising promotion
13 objectives are a subpart of marketing objectives.
14 Q. So in your work you both, you teach both
15 advertising and other promotional activities,
16 marketing --
17 A. Yes.
18 Q. -- covers the whole range?
19 A. Yes.
20 Q. All right. And this is what you did do.
21 You teach people about how to advertise and when to
22 advertise and how to do the things that you have set
23 up here?
24 A. That would feed into this, correct.
25 Q. Yes. And this is just legitimate companies,


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1 any companies do when they are trying to utilize
2 marketing activities, is that not so?
3 A. Yes.
4 Q. Yes. So there is nothing that is
5 illegitimate or sinister or anything about this part
6 of your presentation?
7 A. No.
8 Q. Now, in teaching advertising, you teach
9 people what you do is when you use these things, you
10 teach them how to implement these ideas by utilizing
11 advertising and what is good advertising and what is
12 bad advertising?
13 A. When I teach advertising, I don't talk about
14 these objectives, but, yes, to the second part of
15 your question is correct.
16 Q. And when we talk about bad advertising, we
17 are talking about advertising that isn't effective.
18 I mean in your judgment you have effective
19 advertising and that which is not so effective?
20 A. Correct.
21 Q. All right. Doctor, do you think it is
22 appropriate for the government to limit advertising?
23 A. Yes.
24 Q. To put bans on advertising?
25 A. Yes.



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1 Q. You do?
2 A. Yes.
3 Q. And you would have the government regulate
4 and ban, for example, alcohol advertising?
5 A. It does, yes.
6 Q. Where does it?
7 A. Alcohol, tobacco and firearms.
8 Q. Let's take whiskey for an example.
9 A. Whiskey, I am not sure about that.
10 Q. What about beer?
11 A. The regulation is related to specifically
12 the kinds of people you can show in your --
13 Q. Excuse me. I didn't say "regulation." I am
14 talking about banning. Do you think beer ought to be
15 banned from television, for example, from
16 advertising?
17 A. No, I do not.
18 Q. In fact, you spent some time with the
19 Schlitz Brewing Company, didn't you?
20 A. Yes.
21 Q. And what was your capacity with the Schlitz
22 Brewing Company?
23 A. I was formerly attached to the School of
24 Research Department. I conducted research studies.
25 Q. All right. What kinds of advertisements was



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Schlitz doing in those days?

A. The lifestyle commercials is a way of putting it. "You only go around once" ads. It is a concept. They were run by 1976. They were terminated in 1976.

Q. Grab for the gusto?

A. Yes.

Q. Exactly. Showed people outside, attractive young people on sailing vessels and people doing all sorts of outside activities, as I recall; --

A. Correct.

Q. -- is that right? What was the target audience, your target segment you were trying to reach with those beer commercials?

A. The most common target market was 24 -- I'm sorry, 21- to 34-year-old males.

Q. All right. In some places you tried to get 18 to 34 males?

A. When the 18-year-old laws were legal, yes.

Q. All right. Let's talk about that a minute. Now, you are doing national advertising; right?

A. Uh-huh.

Q. You are sending it all over the country?

A. Yes.

Q. In some states you have 21-year-olds and


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1 some states you have 18-year-olds?
2 A. Yes.
3 Q. But you didn't change your national
4 advertisements, did you?
5 A. No.
6 Q. So effectively you are trying to hit a
7 market out there; it is a market that you can legally
8 sell your product to when you are selling beer; --
9 A. Yes.
10 Q. -- is that right?
11 A. Yes, sir.
12 Q. And that product is at age I think -- at
13 least you told me in those states where it was legal
14 it was 18 to 34, in those states where the beer age
15 was 21, it was 21 to 34, but it was the same ads?
16 A. The same national ads, correct.
17 Q. All right. So obviously, when you try, a
18 company tries to market to a specific target group,
19 it is not precise enough that you can cut off the
20 ends of the group, is it?
21 A. That's true.
22 Q. So when you market, if your target market is
23 18 to 34, there are going to be some folks 17, 16,
24 15, that watch the same programs and watch those ads?
25 A. They would see the ads, correct.



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1 Q. That's right. Maybe somebody even 35 or 36
2 or 37 on the other end watches them?
3 A. Yes.
4 Q. So the point is that national advertising is
5 not a precise science. You can pick out an area you
6 would like to hit, but you can't just do that and
7 eliminate anything else, can you?
8 A. It is not an exact science, correct.
9 Q. All right. Well, and you agree that you
10 can't eliminate those ages that are on each side?
11 A. Not completely.
12 Q. Right. So now you knew when you were
13 advertising at the Schlitz Company that there were
14 probably some people under beer-drinking age that
15 were watching beer commercials.
16 A. Probably.
17 Q. In fact, there are probably some out there
18 even drinking beer.
19 A. I don't know.
20 Q. You don't know whether anybody 16 or 15 or
21 so ever drank any beer?
22 A. Yes, I have seen that.
23 Q. Yes. I thought you have. But it wasn't the
24 intention of the Schlitz Brewing Company to go out
25 and necessarily market to those folks, was it?


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1 A. No.
2 Q. Right. And what they were trying to market
3 to was the 18-year-olds in that state, the
4 21-year-olds in the other states?
5 A. Yes.
6 Q. All right. So I understand you believe that
7 the U.S. Tobacco Company had sinister motives in that
8 regard, but the truth is you really can't tell just
9 looking at the ads, can you, because the ads
10 themselves are ads that appeal to all sorts of ranges
11 of people, but primarily males in sporting
12 situations?
13 A. Yes, but they would also be -- I think they
14 would be effective with younger people more so than
15 older people.
16 Q. All right. What sports did Schlitz
17 advertise on?
18 A. Football, in some locations not on a
19 national basis, they advertised on baseball. Those
20 are the two major ones.
21 Q. And that's again the sporting activities
22 that have appeal to again primarily maybe a certain
23 male age, but people with younger males and older
24 males?
25 A. Possibly.


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1 Q. All right. Now, the use of those
2 commercials in and of themselves simply indicate to
3 you that people were performing a legitimate function
4 in advertising their product in a way that is
5 accepted in this country?
6 A. Would you ask that one again, Mr. Coats?
7 Q. Yes. The fact, just taking the ads
8 themselves, what is happening is that just like --
9 A. Which ads? Beer ads?
10 Q. Beer ads or tobacco ads or the smokeless
11 tobacco ads. I mean that is a legitimate function
12 that people do all the time is advertise their
13 products.
14 A. Yes.
15 Q. And that's what you in fact teach --
16 A. Yes.
17 Q. -- is how to do that? All right. Now, we
18 talked a little bit about the Bogalusa study a little
19 bit more.
20 A. Yes.
21 Q. And you, I think, gave some quotations on
22 the blackboard there from the Bogalusa study. Is
23 that right? Is that what you did?
24 A. Correct.
25 Q. You understand this study was done down in


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1 Bogalusa, Louisiana, '76-77 and 1981 and 1982.
2 A. Yes, sir.
3 Q. Are you familiar with this chart, Doctor?
4 Let the record reflect that I am offering -- let's do
5 this. This would be easier. Aren't those the two --
6 Now, let's look at these. These were
7 excerpts on the Bogalusa study. Have you seen those,
8 Doctor?
9 A. I have not seen these charts.
10 Q. All right. Well, what this chart does,
11 particularly the graph chart, let's look at it a
12 minute. The graph chart shows it in a graphic way,
13 and this document has been admitted in evidence as
14 Plaintiff's Exhibit 29-A, the findings that you had
15 put on the board up there.
16 A. Okay.
17 Q. And it reflects cigarette smoking.
18 A. Yes.
19 Q. Tobacco chewing.
20 A. Yes.
21 Q. And snuff-dipping.
22 A. Correct.
23 Q. All right. What was the status of cigarette
24 advertising back in 1976-77, if you know?
25 A. It was banned on broadcast television.


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Q. All right. Have you ever had occasion to look and see how much advertising in a quantum sense that tobacco chewing is on television?

A. No, I have not.

Q. All right. You have, I take it, looked in a quantum sense at how much snuff advertising is on television?

A. Yes, I think there was some reference to that in the documents.

Q. All right. Would you agree with me that there has been, just from your experience of watching it, there's been substantially more advertising of smokeless tobacco in terms of snuff than there has been on chewing scrap tobacco on --

A. I don't know.

Q. You don't know. You haven't looked at that?

A. No.

Q. All right. Well, that chart in front of you shows that a couple interesting things that came out in the evidence yesterday, one of them is that in that province there was a whole lot more tobacco chewing than there was snuff-dipping.

A. Okay.

Q. Do you see that on the chart?

A. Yes, sir.



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1 Q. And that was true both in '76, '77, and in
2 '81-82.
3 A. Okay.
4 Q. All right. At the same time the charts show
5 that both the tobacco chewing and the snuff dipping
6 peaked out at about age 14 to 15 and went down in
7 both tobacco chewing and snuff dipping. Right?
8 A. Yes, to age 16.
9 Q. Now, the doctor yesterday told us she
10 thought the reason for that was that these people
11 were switching over to cigarette smoking.
12 A. I have no basis for making that --
13 Q. The person that wrote the study thought
14 that?
15 A. Okay.
16 Q. You accept that. You accept the study so I
17 assume you accept what she said.
18 A. Okay.
19 Q. All right. That they were dating during
20 that time, probably doing some kissing and maybe they
21 thought it would be better if they did use smoking
22 rather than snuff is kind of what she was saying
23 yesterday; --
24 A. Okay.
25 Q. -- right? So what you have then, Doctor, is


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1 a situation where you had no cigarette advertising.
2 If you will accept my --
3 A. No broadcast advertising, print advertising.
4 Q. That's right. I am talking about television
5 advertising right now. No major tobacco chewing
6 advertising or a lot less and quite a bit, you have
7 told us, of snuff advertising. Will you accept that?
8 A. Yes.
9 Q. So you have a phenomenon there where people
10 are leaving -- first of all, you have a situation
11 where the younger people are using a product that is
12 nearly as much advertised as the snuff product; is
13 that so?
14 A. In terms of dollar amounts?
15 Q. Yes.
16 A. I don't know.
17 Q. Well, in terms of numbers of people, volume
18 of advertising.
19 A. I can't tell you numbers of people and
20 volume of advertising. Volume of advertising is not
21 on this chart.
22 Q. I thought you agreed to accept with me that
23 you had no volume of television advertising of
24 cigarette smoking less than chewing and quite a
25 bit -- I thought you were telling us that you had a



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1 pretty massive or quite a large amount of television
2 advertising for snuff.
3 A. Television, yes. There was some print
4 advertising, though, magazine --
5 Q. Let's talk about television. We will get to
6 the others.
7 A. Okay.
8 Q. Stay with me on television, because I
9 thought that was your major push, but we will get
10 back to that.
11 Now, what you have here, is you have, first
12 of all, people using a substance for which there is
13 substantially less advertising than there is
14 snuff-dipping in both years, '76 and '81; is that
15 right?
16 A. Yes.
17 Q. And you have even more cigarette smoking
18 which has been totally banned from television during
19 that same period of time?
20 A. Yes.
21 Q. Now, would you agree with me then, at least
22 as far as this document is concerned, it doesn't
23 appear that television advertising was having any
24 major impact?
25 A. No, I wouldn't agree with that, because I


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1 don't know.

2 Q. Okay. Then we go along and we change to a

3 product in their 16th year, they switch from a

4 product about which there has been major television

5 advertising to one where there is no television

6 advertising at all. Do you see that on there?

7 A. Yes.

8 Q. All right.

9 A. The consumption increases. I don't know if

10 they have switched.

11 Q. You understand that the lady yesterday who

12 did the study thought that it did. That is what

13 happened.

14 A. (Nodding yes).

15 Q. Assume for us that that is what happened and

16 what you have are people leaving a product about

17 which you tell us there is a lot of advertising and

18 switching to one where there is no television

19 advertising at all.

20 A. Switching, if that's the word she used in

21 the study, yes.

22 Q. All right. And the same thing would be

23 true, they would be switching from a product that had

24 no warning on it to a product that has a warning on

25 it?



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1 A. Correct.

2 Q. You did in your notes up there indicate that

3 there was a youth prohibition that began to be

4 attached to the products in about 1978.

5 A. Yes.

6 Q. Is that right?

7 A. '77 I think was the year.

8 Q. Did you in some year when you were at

9 Schlitz, did you attach a youth warning for your beer

10 products?

11 A. No. It was illegal to be sold to under-age

12 people.

13 Q. And that is true in most states in the

14 United States about tobacco, isn't it?

15 A. I am not sure of the number, but most --

16 Q. It is true here in Oklahoma?

17 A. Yes.

18 Q. All right. Now, I didn't see anything on

19 those ads up there that talks in terms --

20 MR. BRALY: Excuse me, Your Honor. Excuse

21 me. If Andy is talking about the law in Oklahoma

22 being 18, he needs to mention that it was not

23 effective until after Sean Marsee died.

24 MR. COATS: That's right, correct.

25 MR. BRALY: I didn't think Andy was



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1 attempting to mislead the --

2 THE COURT: Let's don't have a speech.

3 Voice an objection; all right?

4 MR. BRALY: I'm sorry. I apologize.

5 Q. (BY MR. COATS) Now, you don't see anything

6 on there that actually says that it is a safe

7 alternative, do you?

8 A. Implication, no.

9 Q. Can you point to me the words anywhere?

10 A. No.

11 Q. So what you indicate is that you believed

12 those are interpreting, you are interpreting what is

13 said there to indicate that there is some health

14 advantage for snuff over cigarettes?

15 A. Yes.

16 Q. All right. You mean couldn't this simply be

17 a true statement, this fellow here liked tobacco and

18 doesn't smoke?

19 A. It could be.

20 Q. It could be. It could be.

21 A. Again down here, enjoy rich tobacco flavor

22 without the smoke, indicating the smoke is dangerous.

23 Q. When you are using a smokeless product,

24 isn't that what you would say about it?

25 A. Yes.



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1 Q. Okay.

2 A. An implication that I would want to leave in

3 people says that it is safer than smoking.

4 Q. Well, that may be what you want to leave. I

5 am saying I suppose everybody could make their own

6 conclusion on what it says, but it simply says, "I

7 love tobacco and I don't smoke."

8 A. That's what it says. That's what the copy

9 reads.

10 Q. Did you at Schlitz -- you talked about some

11 warning labels -- you didn't affix any warning labels

12 to your beer product --

13 A. No.

14 Q. -- saying this beer could make you drunk and

15 cause car wrecks and that sort of thing?

16 A. No.

17 Q. You didn't, I take it, put any voluntary

18 sale restraints on Schlitz. There is not something

19 on the cans or something?

20 A. You cannot sell the product to minors.

21 Q. I understand. That is the position of the

22 company.

23 A. Yes.

24 Q. We all know, however, that minors were

25 getting it.



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1 A. Okay.
2 Q. And they were getting it all the way along,
3 weren't they?
4 A. (Nodding yes).
5 Q. I mean for years they had?
6 A. Possibly, yes. I haven't seen the numbers,
7 Mr. Coats.
8 Q. Well, the point I am making to you is that
9 you were at Schlitz and you were trying to do a good
10 job that you were trying to limit your advertising,
11 and yet we know minors were seeing your
12 advertisements and we knew they were using your
13 products?
14 A. In all likelihood, yes.
15 Q. And it is all very definitely. You
16 understand the way in which U.S. Tobacco sells its
17 products that it doesn't sell to the public?
18 A. What do you mean?
19 Q. Well, for example, they only have wholesale;
20 they sell it to the stores and the stores sell it to
21 the consumer?
22 A. Yes.
23 Q. The same as Schlitz did. I don't think
24 you --
25 A. The same channel marketing, through



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1 wholesalers and retailers.

2 Q. Exactly.

3 A. With company sales reps providing some

4 guidance. The only point I want to make to you is,

5 and see if you agree with me, it is very difficult

6 for a company to control that when the product is in

7 the hands of retailers all over the country, isn't

8 it?

9 A. It is difficult to police.

10 Q. I beg your pardon?

11 A. It is difficult to police.

12 Q. Yes. Now, you talked a little bit about the

13 Lotus Project here, and I want to ask you: Did you

14 understand that that was a project that was

15 undertaken in Sweden by the Swedish government-owned

16 tobacco company?

17 A. Yes, a joint project.

18 Q. Right.

19 A. That dealt with tobacco.

20 Q. If you read the document, it says that the

21 project was by the Swedish Tobacco Company and what

22 U.S. Tobacco Company was to do, says on the document

23 was that it was going to monitor it and try to

24 develop a tea bag product.

25 A. Yes.



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1 Q. And you understand that tea bag product
2 later became another product that they were working
3 through on this effort?
4 A. No, I do not know that.
5 Q. All right. Did you notice in there that one
6 day that the U.S. Tobacco people said they wanted a
7 similar product, not a similar project. Did you
8 understand that?
9 A. Yes.
10 Q. All right. So with what that document is,
11 that talked about the 15 to 35, that is what the
12 Swedish government tobacco company was going to do,
13 market their Swedish product in Sweden?
14 A. On the other hand, Mr. Bantle said, in the
15 quote, I believe, I am paraphrasing, that he wanted a
16 Lotus-type product --
17 Q. Product, yes, sir.
18 A. -- for here.
19 Q. That's right.
20 A. Yes, sir.
21 Q. But it didn't say Lotus-type project?
22 A. He said "product."
23 Q. Thank you.
24 MR. COATS: I believe that's all -- excuse
25 me just a minute. Maybe I have got one from my --



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Q. (BY MR. COATS) Oh, yes, I did want to ask this, and I overlooked it. The high school film. Do you know how that film was disseminated?

A. No, I do not.

Q. Does it make any difference in your views if you knew that the product had to be requested? I mean that the film had to be requested by high school officials from the company and shown by the high school officials at the school?

A. No, it does not.

Q. Does that change your view any?

A. No.

Q. One of the questions about that, what does Schlitz do to keep minors from 18 years old and younger, to keep them from using it?

A. The instruction in the sales documents that I saw were -- it was illegal to sell the product from a retail point of view. If I were a retailer and I were caught selling beer, it implied a large fine. Eventually I would lose my license.

Q. Right.

A. So, therefore, I had an incentive not to sell beer to minors.

Q. All right. Exactly. So there are statements in the documents in the beer business



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1 where they said, you know, "Don't break the law,
2 don't sell to one under that age"; --
3 A. Yes, sir.
4 Q. -- is that right?
5 A. Yes.
6 MR. COATS: Okay. That's all.
7 THE COURT: Redirect?
8 REDIRECT EXAMINATION
9 BY MS. DESCHAMPS-BRALY:
10 Q. Doctor Cagley, if you will give me a moment,
11 I need to refer to my notes. My first question to
12 you is the notes that Mr. Coats asked you about, did
13 you prepare those in relationship to all of those
14 numerous documents that I had you review, or did you
15 prepare those in order to be able to answer some
16 prefabricated set of questions I was going to ask
17 you?
18 A. The former. I didn't know the questions you
19 were going to ask me.
20 Q. Thank you, sir. Doctor Cagley, can you
21 isolate print advertising, pictures like those up
22 there, from television advertising insofar as the
23 effect that it has on particular human beings?
24 A. Yes, ordinarily.
25 Q. All right. Can you tell us about that?



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A. Isolate the effect. The objectives of either print advertising or television advertising or any kind of advertising would probably be similar in terms of generating awareness for a company, for a product, for a brand. The objectives would be similar. The way those are carried out would be somewhat different, however, in terms of your advertising, in terms of your media plan, what you buy. I guess I don't understand the question very well, Mrs. Braly.

Q. In other words, I am saying that if an individual is seeing both advertisements in magazines, in the newspaper, whatever, print, --

A. Okay.

Q. -- print advertising, and they are also watching television at the same time, is it really possible to isolate what impact which is having on a particular individual? Unless you have got a control study I am talking about.

A. Unless you have got a control, unless you know exactly what ads they have been exposed to.

Q. Mr. Coats was telling you about Mrs. Marsee's testimony that Sean didn't watch very much television, --

A. Yes.



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Q. -- and you said you didn't know. Did you know that she had testified that Sean watched sports programs on television?

A. No, I did not know that.

Q. If you were aware of that, is there anything in the documentation you saw that would have made it apparent to you whether he would have been exposed to these types of advertisements on sports programs on television?

A. The plans and the objectives and again for some of the -- that is within some of the documents that I saw were that sports programming was important to them. Sports kinds of activity were important to U.S. Tobacco. Would he have seen those if he were in the audience? Yes. Would he have been exposed to them?

Q. Doctor Cagley, you previously testified that one-on-one sampling was very important; is that correct?

A. Yes.

Q. Did you know that Sean Marsee was first exposed to Copenhagen Snuff when it was given to him as a free sample at a rodeo?

A. No, I did not.

Q. Would you, if you know that, understand that



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1 to be good marketing strategy?
2 A. From the company's point of view?
3 Q. I am not talking about moral; I am talking
4 about good marketing strategy.
5 A. From the company's point of view, that would
6 be regarded as good marketing strategy.
7 Q. Now, Doctor Cagley, Mr. Coats also asked you
8 something about the Bogalusa study, --
9 A. Yes.
10 Q. -- and wasn't it surprising that when those
11 youngsters reached the age of 16 or 17, the amount of
12 snuff they were using, the numbers decreased, maybe
13 because of girlfriends and kissing or whatever. Do
14 you remember him asking you about that?
15 A. Yes.
16 Q. Would you find it surprising if someone was
17 addicted to nicotine and wanted to switch to
18 something else that they would switch to cigarettes
19 in order to keep their nicotine intake up?
20 A. Do I find that surprising? No.
21 Q. Just a few more questions. Although the
22 subject here today is not beer, it is snuff, if beer
23 is used as it is intended to be used, does it cause
24 alcoholism?
25 A. No.



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1 MR. COATS: I object to that. I doubt if he
2 knows whether it causes alcoholism or not. He's not
3 qualified as an expert on the physiological aspects
4 of alcohol.
5 THE COURT: Sustained.
6 Q. (BY MS. DESCHAMPS-BRALY) Prefacing with the
7 fact that you are not a health-care professional, if
8 it turned out that using smokeless tobacco as it is
9 intended to be used by the manufacturer can be
10 harmful from a marketing standpoint, then should
11 additional measures be taken in order to protect the
12 public from that marketing standpoint?
13 A. My opinion?
14 Q. Yes, sir.
15 A. Yes.
16 Q. And finally, Doctor Cagley, if advertising
17 has a relatively small impact, as Mr. Coats implied
18 that it did, why would the tobacco industry spend
19 millions of dollars every year on advertising if it
20 has no effect?
21 A. They would not.
22 MS. DESCHAMPS-BRALY: Thank you, sir. No
23 further questions.
24 RECROSS EXAMINATION
25 BY MR. COATS:



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1 Q. A couple of questions, please, Your Honor.
2 You had testified you were talking about the print
3 media there.
4 A. Yes.
5 Q. And I thought you told us in your earlier
6 testimony that teenagers didn't read much, that print
7 media is not a good way to reach teenagers.
8 A. Teenagers. I didn't say teenagers. I said
9 young children. I meant elementary school people the
10 principal medium.
11 Q. I understood the testimony to be teenagers.
12 You are saying that is not what you said?
13 A. That is not what I said, I don't believe.
14 Q. And I gathered from the whole thrust of your
15 testimony that what you have said to us is that these
16 marketing measures could have -- I believe your
17 phrase in the deposition was could have possibly
18 influenced Sean Marsee?
19 A. Yes.
20 MR. COATS: That's all.
21 THE COURT: You may step down. You are
22 excused.
23 Mrs. Braly, have we got all the exhibits
24 which were admitted pursuant to --
25 MR. BRALY: Yes.



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1 THE COURT: -- his testimony?

2 MR. BRALY: We have got the originals. I

3 want to make sure he doesn't have the two Bogalusa

4 photographs.

5 THE COURT: We have got them right here.

6 MR. BRALY: I would call Jack Zurawick.

7 JACK ZURAWICK,

8 called as a witness on behalf of the plaintiff, being

9 first duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. BRALY:

12 Q. State your name, please.

13 A. Jack Gerard Zurawick.

14 Q. Mr. Zurawick, why don't you spell your last

15 name for the court reporter.

16 A. Z-u-r-a-w-i-c-k.

17 Q. Where do you reside, sir?

18 A. Tulsa, Oklahoma.

19 Q. And how long have you lived there?

20 A. Five years.

21 Q. How old are you, sir?

22 A. Twenty-seven.

23 Q. As a young person did you play college

24 sports?

25 A. Yes, I did.



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1 Q. Did you ever have any experience in
2 receiving free samples of snuff from the U.S. Tobacco
3 Company at things like that?
4 A. Yes, I did.
5 Q. Copenhagen and Skoal?
6 A. Yes, sir.
7 Q. Do you recognize those?
8 A. (Nodding yes).
9 Q. How many different schools did you attend?
10 A. I attended four colleges in five years for
11 undergraduate education.
12 Q. You got around pretty good.
13 A. I sure did.
14 Q. What kind of sports did you play?
15 A. I was a college baseball player. I was
16 two-time All-American.
17 Q. During the process of this, did you ever
18 have occasion to get rolls, free samples of
19 Copenhagen or Skoal or Happy Days smokeless tobacco
20 from U.S. Tobacco Company directly?
21 A. Yes, sir.
22 Q. Did it come to the teams?
23 A. Yes, sir, it would come to the teams, if you
24 requested it to be sent to the athletic department.
25 Or it could come directly to you if you requested



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1 that it be sent to you.

2 Q. Just sent to you without any charge just

3 because you were an athlete?

4 A. Yes, sir.

5 Q. Were there any 17-year-olds playing on any

6 of those baseball teams?

7 A. Yes, sir.

8 Q. Did they ever come with any restrictions in

9 passing that stuff out to minors?

10 A. No, sir.

11 Q. That happened at each of the four places

12 where you played college baseball?

13 A. Yes, sir.

14 MR. BRALY: No further questions.

15 CROSS EXAMINATION

16 BY MR. JENNINGS:

17 Q. You said you had 17-year-olds in college?

18 A. Yes, sir.

19 Q. How many of them did you have?

20 A. I couldn't give you a number. There were a

21 few, one or two on each team.

22 Q. If you start to school in the first grade at

23 age six and go to school for 12 years before you get

24 to college, you ought to be 18 by the time you get to

25 college, shouldn't you?



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A. Yes, sir, some of whom are accelerated.

Q. I understand, but you ordinarily expect when you are dealing with college people you are dealing with somebody who is at least 18 years of age, don't you?

A. I would assume so, yes.

Q. Now, these samples that you say came in to the athletic department, who handled those?

A. I don't know what you mean by who handled them.

Q. Who had custody and the control of them?

A. They would be sent to whichever coach requested it.

Q. All right. Then the coach handled them?

A. Yes, sir.

Q. And if the coach wanted to give them to the players, the coach gave them out?

A. No, sir. They were put in common storage, refrigerated.

Q. They were made available to the players by the coach; is that correct?

A. If it came to him, yes.

Q. And the coach made the decision as to the players to whom it would be made available, didn't he?



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A. No, he did not.

Q. He didn't?

A. No. It was put in common storage. Anybody could grab a chin when he wanted it.

Q. All right. So he made a decision that anybody who wanted them could have them; --

A. Yes, sir.

Q. -- is that right?

A. Yes, sir.

Q. He did make a decision?

A. Yes, he made the initial decision to make it available.

Q. He could have made a decision not to give them to any of the players, couldn't he?

A. Sure.

Q. Or he could have made a decision to give them only to some of the players, not to others, couldn't he?

A. He sure could.

Q. But he made the decision to let any of the players who wanted them have them; is that right?

A. Yes, sir.

Q. The tobacco company didn't make that decision? The coach made it?

A. Yes, if it came to him.



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1 Q. If they came to the individuals, how did
2 they arrive?
3 A. They arrived in a cardboard roll that was --
4 had the ends flipped in and sealed, and inside there
5 was nothing more than a cellophane roll of 12 tins of
6 tobacco.
7 Q. Excuse me. My question wasn't very artful.
8 How did they happen to come to individuals? Why did
9 they come to individuals?
10 A. Because they were sent to them and asked
11 them either to send it to you or if they had
12 wholesale rates for team members or for groups.
13 Q. Well, who asked them to send them to you?
14 A. The individual or the players got together
15 in a group and sent a letter out.
16 Q. Do they have wholesale rates for free
17 tobacco?
18 A. I never found out -- well, no, that's the
19 thing. You asked for wholesale rates. You got a
20 roll back.
21 Q. But the reason you made the request was
22 because you thought you could get a wholesale price?
23 A. Yes, sir.
24 Q. Did you get a wholesale price?
25 A. No, sir.


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1 Q. What made you think you were going to get a
2 wholesale price?
3 A. We -- sometimes companies send things to
4 groups cheaper than they do to the public
5 individually.
6 Q. So that's the reason that you were making
7 the application, the request for samples or for the
8 wholesale price; is that right?
9 A. We were requesting a wholesale price, yes,
10 sir.
11 Q. All right.
12 MR. JENNINGS: Thank you.
13 THE COURT: Anything further, Mr. Braly?
14 MR. BRALY: Yes.
15 REDIRECT EXAMINATION
16 BY MR. BRALY:
17 Q. You didn't get them wholesale, you got them
18 free, didn't you?
19 A. Yes, sir.
20 Q. You said you were two-time All-American?
21 A. Yes, sir.
22 Q. Do you think that is an aspiration that a
23 lot of young men would have had to be a two-time
24 All-American?
25 A. Yes, sir.



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1 Q. Would you carry those cans of snuff in your
2 hip pocket when you played in front of the public?
3 A. Yes, sir.
4 Q. Could you see them sticking out your hip
5 pocket of your baseball uniform?
6 A. You certainly could.
7 MR. JENNINGS: If the Court please, I don't
8 think this is redirect examination.
9 THE COURT: Overruled.
10 Q. (BY MR. BRALY) At the time they sent them
11 to you either directly or to the coaches, did the
12 United States Tobacco Company send along a warning
13 and say this may cause cancer of the mouth that could
14 cost you your life?
15 A. No, sir.
16 Q. They never told you that, did they?
17 A. No, sir.
18 Q. If the tobacco company knew that they had
19 carcinogenic nitrosamines in their snuff that were
20 higher than any other consumer product, --
21 MR. JENNINGS: If the Court please.
22 Q. (BY MR. BRALY) -- would you, as a consumer,
23 like to have had that information when they sent
24 those free samples?
25 MR. JENNINGS: This is not redirect



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1 examination.

2 THE COURT: Sustained.

3 MR. BRALY: Nothing further, Your Honor.

4 THE COURT: You may step down.

5 Did you have anything further?

6 MR. JENNINGS: No, Your Honor.

7 THE COURT: You may step down.

8 THE WITNESS: Thank you, Your Honor.

9 THE COURT: Call your next witness.

10 MR. BRALY: Your Honor, we would call Jim

11 Horrell.

12 JAMES F. HORRELL, PH.D.,

13 called as a witness on behalf of the plaintiff, being

14 first duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. BRALY:

17 Q. State your full name, please.

18 A. James Freeland Horrell.

19 Q. Doctor Horrell, how are you employed?

20 A. I'm an associate professor of business

21 administration at the University of Oklahoma.

22 Q. How long have you held that position?

23 A. I came to the University of Oklahoma in the

24 summer of 1974.

25 Q. Prior to that time what has been your



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1 educational background?

2 A. The four years immediately prior to coming

3 to the University of Oklahoma I was an assistant

4 professor at Washington State University in Pullman,

5 Washington, and the five years immediately preceding

6 that I was working on a Ph.D. at Colorado State

7 University. One of those years I was an instructor.

8 Q. Doctor, what is your degree in?

9 A. I have a Ph.D. in statistics.

10 Q. And at the present time you are still at the

11 University of Oklahoma?

12 A. Yes, I am.

13 Q. And in what college there are you located?

14 A. The College of Business Administration.

15 Q. What are your responsibilities there?

16 A. I teach courses that deal with quantitative

17 statistics as they apply to various areas of business

18 administration and economics. I teach courses in

19 economics, in finance, some in marketing. All these

20 courses have a quantitative orientation to them. I

21 also in the past five years have been teaching

22 investments, capital budgeting, financial markets and

23 institutions, and corporate finance.

24 Q. The courses you teach in corporate finance,

25 what does that involve?



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A. Well, basically it involves looking at the financial structure of corporations, financial strategies, financial management. Of particular interest is the financial structure of the company.

Q. In doing that, do you have to review the financial statements of the companies?

A. Yes. It's the primary focus of those courses.

Q. Do you have any experience as a consultant to industry or corporations?

A. Yes.

Q. Describe that for us, please.

A. I would say that over the past 12 to 14 years I have slowly started and gained a certain amount of momentum in terms of consulting with a variety of companies from, I would say, small regional companies to some Fortune 500 companies. I have an association with a forecasting specialty firm out of England. I do some ad hoc consulting with that Fortune 500 company for them here in the United States.

Q. Could you give us some examples?

A. Yes. Shell Oil, Phillips Petroleum, Seagram's 7, Mars candy bars, Standard of Indiana.

Q. Doctor, have you testified before as an



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1 expert witness?

2 A. Yes, I have.

3 Q. In the course of that experience have you

4 done work in trying to estimate or calculate the lost

5 earnings of people in connection with litigation?

6 A. Yes, I have done that a number of times.

7 Q. You understand that we are here in

8 connection with a young man by the name of Sean

9 Marsee who died of cancer of the mouth in this

10 lawsuit?

11 A. Yes, I understand.

12 Q. And have you made an effort or attempt to

13 estimate the lost future earnings for young men such

14 as Sean Marsee?

15 A. Yes, I have.

16 Q. Could you tell the jury what you have done

17 and how you have gone about doing that?

18 A. Would it be okay for me to use the board to

19 do that?

20 MR. BRALY: Your Honor?

21 THE COURT: Yes, go ahead.

22 A. Well, essentially I needed some information

23 about what Sean Marsee intended to do with his life,

24 and I made a request for that information. And the

25 information I was given indicated that he intended to



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join the Army and to make a 20-year career of the military and that upon retiring from his 20-year military service that he intended to try to find a job with the U.S. Forestry service or some similar outdoors-type of occupation.

So based on those intentions I made some conservative assumptions and calculated the earnings that he would have received while he was in the service. I also calculated the pension that he would have received as a consequence of retiring from the military at the end of 20 years, and then I also put him in at a low level U.S. forestry type job, a GS-5, and I had him do a second career in the U.S. Forestry.

THE COURT: Before you go on, counsel, come forward just a moment.

(The following proceedings were had AT THE SIDE BAR.)

THE COURT: I must have lost my mind to raise a issue that wasn't raised, but what is the relevance to his future earnings?

MS. DESCHAMPS-BRALY: Okay. He's here testifying to two aspects. One aspect of our case would have been his future earnings for the support that he would have provided for his mother. The



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1 second part of his testimony has to do with the
2 punitive damages aspect of the case. That's in the
3 pretrial order.
4 MR. JENNINGS: If the Court please, no
5 objection has been raised yet, but I was waiting to
6 find out what all of his assumptions were, and I was
7 assuming that he was going to make some assumptions
8 relative to support.
9 THE COURT: Can you relate this to support;
10 is that it?
11 MS. DESCHAMPS-BRALY: Yes, yes.
12 MR. BRALY: Judge, this witness is not going
13 to relate this to support. This witness is going to
14 estimate what those earnings would have been. This
15 witness is going to estimate what those earnings
16 would have been. There has been testimony that Sean
17 Marsee did, in fact, support his family.
18 MS. DESCHAMPS-BRALY: And there will be now.
19 I know it has to be tied in. He will say how much
20 his monies would have been, other people would have
21 talked, have talked about what his contribution would
22 be, and the jury has got to infer from that what kind
23 of living he would have made and what he did as a
24 teenager, what he would have been expected to
25 contribute to the support of his mother.


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1 MR. BRALY: Judge, we fully admit it is a
2 minor issue, it is a relatively minor amount of
3 money, but it is something we have got to go through
4 the dance on to get into the record.
5 THE COURT: Isn't she employed --
6 MR. JENNINGS: Yes.
7 THE COURT: -- as a nurse?
8 MR. BRALY: Yes.
9 THE COURT: Was there any evidence that she
10 was dependent on him?
11 MR. JENNINGS: None.
12 MS. DESCHAMPS-BRALY: He also contributed to
13 the family. I mean given the kind of employment that
14 he had in his teen-age years that he was alive, he
15 always contributed to his family support. There is
16 no reason to think -- and there will be testimony
17 that he also said, "Mama, I will take care of you."
18 MR. JENNINGS: Not one word of testimony as
19 to what amount he contributed to the support of
20 anybody.
21 MS. DESCHAMPS-BRALY: And, Alston, if you
22 read all the depositions, -- and, believe me, I have
23 been through them lately -- you will see there was.
24 MR. JENNINGS: I sat in the courtroom and
25 heard the testimony. I don't care about the


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1 depositions.

2 MS. DESCHAMPS-BRALY: All you heard about is

3 the mother. You haven't heard any of the siblings

4 testify yet.

5 MR. FINNEGAN: That's the point, they

6 haven't testified.

7 THE COURT: Assuming they are going to

8 testify that he said he would support the mother,

9 what is the damage?

10 MR. BRALY: Judge, --

11 MS. DESCHAMPS-BRALY: Under the statute she

12 is entitled to whatever support he would have

13 provided to her. Okay. The jury is going to have to

14 infer how much that is. It is not a major part of

15 our lawsuit, you know. We are not here arguing that

16 it is, but in order to get it in at all, the proof

17 must be submitted as to how much he would have been

18 expected to make for the rest of his life to presume

19 that he could have supported a family of his own or

20 could have supported his mother. If he had no

21 prospects for the future, then he would have no

22 prospects of sending her any money.

23 THE COURT: What is the defendant's

24 position?

25 MR. JENNINGS: Our position is, if the Court



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1 please, that unless there is some evidence as to the
2 amount that he would be so contributing to the
3 support of somebody, that what he earned has no
4 relevance whatsoever, and the only relevance of
5 testimony of his earnings would be to show that he
6 would be able to earn enough to contribute X dollars
7 in support, but the total earnings are not the
8 measure of damages. It is what he would have
9 contributed, if anything.
10 THE COURT: Is there going to be something
11 to show what, assuming he's got a billion dollars, or
12 any amount, what he would support, how much he would
13 give to someone?
14 MS. DESCHAMPS-BRALY: Well, the testimony
15 will be what he -- when he was making approximately
16 what, $400 a month or $300 a month, that he was
17 giving his mother approximately 100 of it, and he was
18 buying clothes for his younger brother.
19 THE COURT: Did she testify to that?
20 MR. JENNINGS: No, she did not.
21 MR. BRALY: It's in the deposition.
22 MS. DESCHAMPS-BRALY: It is in the
23 deposition of the siblings. And one of them will
24 testify as to the actual amount of money. The others
25 will testify as to his buying clothing for the



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1 younger brother. The term of art escapes me, but
2 isn't this what we call subject to proving up?
3 (The following proceedings were had IN OPEN
4 COURT.)
5 THE COURT: I'll tell you, ladies and
6 gentlemen, let's go ahead and take a recess now,
7 20-minute recess, with my usual admonitions to you.
8 Everyone remain seated while the jury exits.
9 (The following proceedings were had OUT OF THE
10 PRESENCE AND HEARING OF THE JURY.)
11 THE COURT: It just strikes me -- do you
12 have any authority on this? It just strikes me here
13 is a woman that is employed and she's got a boy that
14 lives at home and maybe gives her money periodically,
15 which could be very well just for his own expenses
16 for living there --
17 MS. DESCHAMPS-BRALY: Well, Your Honor, the
18 testimony is going to be that this was her eldest
19 child, a child that was aware that here was a mother
20 who for most of all of her life he can remember had
21 to work to provide for a family of five children with
22 nothing from her husband except his small disability
23 check, and that in his later years he wanted his
24 mother not to have to work so hard and that he
25 intended to help her as soon as he was in the Army


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1 and he was making some money.

2 That's what the brothers and sisters are

3 going to say, and to me it doesn't sound

4 unreasonable. I don't know how anybody else feels

5 about their parents. I try to take care of my mother

6 right now as best I can when she is a widow.

7 THE COURT: Do either of you know whether

8 you have got a legal right to collect damages for

9 future expectation like that, which may or may not

10 come true?

11 MR. BRALY: Yes.

12 MS. DESCHAMPS-BRALY: Yes, Your Honor.

13 MR. BRALY: We looked at the case law on it

14 pretty carefully, Judge, and if there was no evidence

15 that he had ever supported a parent, okay, then it

16 would not be proper. We readily admit that we looked

17 at it very carefully.

18 However, the evidence, you know, it has

19 already been adduced in the depositions, that he did

20 in fact do that and started doing it at a very young

21 age. And we are, you know, we are not trying to make

22 a big issue out of this thing, but it is there, and

23 it's --

24 MR. JENNINGS: Well, --

25 MR. BRALY: I don't know any other way to



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1 cover it.

2 MS. DESCHAMPS-BRALY: I don't want to

3 misrepresent anything to the Court. This is not a

4 major part of our case. It's there, it is some

5 money, but, you know, we are not talking about --

6 THE COURT: Is it worth the risk of offering

7 it?

8 MR. BRALY: Well, Judge, we are satisfied

9 the law provides for it.

10 THE COURT: Do you have the cases? Right

11 now I don't believe there is any evidence that would

12 merit support. I accept your word that there will be

13 evidence that he gave a hundred dollars a month.

14 MS. DESCHAMPS-BRALY: Let me ask you this.

15 Would it be better to go ahead and have Doctor

16 Horrell go into the punitive damages aspect now,

17 because at the rate we are going, we are not going to

18 finish by tonight, and let us bring you the case law

19 and continue on with the other portion of it.

20 THE COURT: I hate to have you bring

21 somebody back and cause extra expense. If you have

22 got the authority, I will give you the opportunity to

23 look at it.

24 MS. DESCHAMPS-BRALY: I will have to go back

25 over and search for it.



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1 MR. BRALY: I don't want to get into a big
2 rush. Judge, it came out of the statute, a couple of
3 cases along with it.
4 THE COURT: Maybe I can just go back and
5 find it, and I am not trying to limit you if it is
6 appropriate, but it concerned me.
7 MR. BRALY: I am concerned that the Court be
8 satisfied. We obviously don't want to submit
9 something that is not proper, but we looked at this
10 at the time that we filed the complaint, looked at it
11 fairly carefully, and came to this conclusion that
12 that's what the law was then, and they certainly
13 didn't challenge it in the pretrial order or even in
14 their contentions.
15 MS. DESCHAMPS-BRALY: By all means satisfy
16 yourself and check it. We don't want any reversible
17 error in the record.
18 THE COURT: Do you feel strongly about it?
19 MR. JENNINGS: Yes, Your Honor.
20 MR. FINNEGAN: Yes, Your Honor.
21 MR. JENNINGS: I don't think there is going
22 to be any evidence that he supported his mother. He
23 may have given her a little money, but that is not
24 proof of support.
25 MS. DESCHAMPS-BRALY: What do you call it


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1 when you give people money at home?

2 MR. JENNINGS: When you are living at home,

3 you may be paying for your way.

4 MR. BRALY: That's right.

5 THE COURT: Let's go look at it. We will be

6 in recess.

7 (A brief recess was here had.)

8 (The following proceedings were had IN THE

9 PRESENCE AND HEARING OF THE JURY.)

10 THE COURT: You don't need to sit down. If

11 you just come in, I will tell you what we need to

12 do. All the jurors are -- We are going to recess for

13 the weekend right now. I have decided this has been

14 a long enough week and it was time to recess for the

15 weekend, so we will recess to reconvene at 9:30 on

16 Monday morning. And remember you still have not

17 heard all the evidence in the case.

18 It is anticipated I think now that the

19 plaintiff will rest its case Wednesday or Thursday,

20 and the defendant will then begin its case. You have

21 not heard all the plaintiff's case, and you haven't

22 heard the defendant's case. Don't make up your mind

23 in the case until you have heard all of the evidence,

24 and don't read or listen to anything about the case

25 or discuss the case with anyone this weekend or at



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1 any time outside the courtroom. Have I missed
2 anything?
3 Have a nice weekend, and see you Monday.
4 Good night.
5 Court will be in recess.
6 (Court was recessed until 9:30 a.m., June 9,
7 1986.)
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